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CONGRESSIONAL REPORTS ELIMINATION ACT OF 1985

DECEMBER 9, 1985.—Ordered to be printed

Mr. ROTH, from the Committee on Governmental Affairs, submitted the following

REPORT

[To accompany S. 992]

The Committee on Governmental Affairs, to which was referred the bill (S. 992) to discontinue or amend certain requirements for agency reports to Congress, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

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I. PURPOSE

The purpose of S. 992, the Congressional Reports Elimination Act of 1985, is to eliminate or modify statutory reporting requirements which no longer serve their original purpose or for which the information is available to Congress from other sources.

II. BACKGROUND AND NEED FOR LEGISLATION

In fiscal year 1985, there were approximately 3,300 congressionally mandated reporting requirements. By statute, these reports are made to Congress at specified intervals by various executive

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agencies and departments at a cost of approximately $240 million a year. Periodically, the Office of Management and Budget (OMB) reviews the reporting requirements to determine whether or not they are still necessary.

This year, the OMB proposed the repeal of 190 reporting requirements and the modification of 50 others. The OMB solicited candidates for elimination or modification from the federal agencies and departments responsible for submitting the reports to Congress. According to the OMB, it did not accept all recommendations offered by the affected agencies. The Administration's proposal, therefore, was a compilation of those recommendations from the relevant agencies that were approved by the OMB.

The OMB recommended repeal or modification of the statutory reporting requirement if:

(1) The report no longer serves its original purpose;

(2) No congressional use is evident;

(3) The information is available to Congress from other sources; or

(4) The cost and time involved in preparing the report outweigh the benefit to the public.

At the request of the Administration, Senators William S. Cohen, William V. Roth, Jr. and Lawton Chiles introduced S. 992, the Congressional Reports Elimination Act of 1985, on April 24, 1985. Senator Carl Levin subsequently joined as a cosponsor. S. 992 was reported by the Committee on Governmental Affairs with an amendment in the nature of a substitute. Provisions in this amendment affect 127 reports, 113 less than in the bill as introduced.

The legislation, modeled after the Congressional Reports Elimination Act of 1982, is designed to improve the efficiency of agency operations by eliminating or modifying those recurring reports to Congress which no longer serve a useful purpose. The Congressional Reports Elimination Act not only attempts to reduce the burden placed on federal agencies by the proliferation of reports, it also attempts to streamline the information that flows from these agencies to Congress. For example, section 116(a) of S. 992, as reported by the Committee, amends the Higher Education Act of 1965 to eliminate the Annual Report from the National Advisory Council on Continuing Education to the President, Congress, and the Secretary of Education because the report is duplicative of the requirement under the General Education Provisions Act that all statutory advisory councils make such a report. Other examples of particularly egregious reporting requirements include the requirement that the Secretary of Education report biennially to Congress on the findings and recommendations of the Office of Education Professional Development—an office abolished in 1981. Section 106(b) of the legislation discontinues this reporting requirement.

The legislation also modifies reports that are overly burdensome to the affected federal agencies. For example, section 204(b) amends the Foreign Trade Zones Act of 1934 by eliminating the reports required from the zones and the FTZ board to Congress on zone finances and by deleting the requirement that zone reports be attached to the board's reports to Congress. The number of zone reports has increased from 10 to 98 since 1970 and, consequently, the reporting burden of the FTZ board has been significantly increased.

Finally, reports were discontinued based on a negative determination of their continuing usefulness. For instance, section 107(c) of S. 992 repeals the requirements for an annual report on coal reserves disclosure from the Department of Energy because U.S. coal reserves are estimated to last in excess of 300 years.

Enactment of S. 992 would significantly reduce both the staff time and costs to many federal agencies of preparing reports which are no longer considered useful. The OMB estimates that the repeal or modification of these 127 reports will result in savings of approximately $5 million. Moreover, federal agencies will be able to concentrate their limited resources on those remaining reports that are necessary for effective congressional oversight.

Title I of S. 992 repeals specified provisions of federal law requiring federal agencies or the President to submit reports to Congress, the President or the public. Title II amends certain provisions of federal law to modify reporting requirements by (1) combining such reports; (2) reducing the frequency of the contents of such reports; or (3) making technical changes.

III. COMMITTEE ACTION

S. 992, as originally introduced, contained a compilation of approximately 240 reports which the OMB had recommended for elimination or amendment. As reported by the Committee, the bill reflects the recommendations received from the Senate committees with jurisdiction over the subject matter covered by these reports; thus, the Committee substitute retains 113 of the reports targeted for elimination or modification by the OMB.

The Oversight of Government Management Subcommittee, to which the bill was referred, distributed copies of S. 992 to each of the substantive committee chairman and ranking minority members affected by the legislation. A section-by-section analysis, which highlighted the affected reports under each committee's jurisdiction, was sent along with the bill. The chairmen and ranking minority members were asked to review the relevant reporting requirements and indicate their objections, if any, to the bill's provisions. Follow-up contacts by the staff of the Oversight Subcommittee were made to ensure that replies were received from every committee. As a result, the Subcommittee ultimately received letters from every affected committee.

In an effort to ensure that the Congress continues to receive the information necessary to its work, the Subcommittee acceded to requests from the committee chairmen and ranking minority members to delete certain provisions from the legislation (in order to retain the reporting requirements) or to modify the language affecting other reports. Following the reporting of S. 992 by the Subcommittee on August 1, a few additional requests for further modifications or eliminations were received from the affected committees. In addition, some drafting errors were noted by the Subcommittee. The Committee substitute reflects these changes and corrects the drafting errors.

The affected committees agreed with the repeal of 97 reporting requirements and the modification of 30 others. Some of the reasons for deleting or modifying the original provisions of S. 992 include the report's continued usefulness and pertinence in a committee's oversight of government programs and activities or the presence of substantive material in the report which should be the subject of in-depth hearings prior to any changes in the law.

IV. CONCLUSION

The need to reduce congressionally mandated reporting requirements must be carefully weighed against the congressional need for information concerning government programs and activities. Current information, received on a timely basis, is essential to Congress in fulfilling its oversight functions.

Passage of S. 992 will enhance the economic and efficient operation of federal government activities by reducing or eliminating 127 congressional reporting requirements. These changes will allow the resources currently used in fulfilling those requirements to be channeled to more essential functions.

V. SECTION-BY-SECTION ANALYSIS

Title I: Elimination of reporting requirements

Section 101 eliminates certain reports required of more than one agency.

Section 101(a) repeals a provision of the Biomass Energy and Alcohol Fuels Act of 1980 which requires that the Secretary of Agriculture and the Secretary of Energy submit quarterly reports to Congress on biomass energy development.

Section 101(b) eliminates the requirement that heads of agencies submit annual reports to Congress concerning agency utilization of scientific or professional positions that are established outside both the General Schedule and Senior Executive Service.

Section 101(c) amends a provision of the Toxic Substances Control Act to eliminate the annual report required by the Secretary of Health and Human Services (HHS) and the Administrator of the Environmental Protection Agency (EPA) concerning conflicts of interest involving HHS or EPA employees who perform functions under the act.

Section 101(d) repeals a provision of title 31 which requires federal agencies to complete an annual evaluation of their progress in improving consultant service contractual agreements.

Section 101(e) eliminates the requirements that the Director of the Office of Management and Budget (OMB) and the Secretary of the Treasury submit annual reports on their plans to meet the information needs of Congress.

Section 101(f) deletes the requirement that the Secretary of Defense and the Secretary of Health and Human Services report annually to Congress on the continuation-pay program for dentists in the uniformed services.

Section 101(g) amends a provision of the Federal Property and Administration Services Act of 1949 which requires that the Secretaries of Health and Human Services, Education and the Interior submit annual reports to Congress on certain costs associated with the surplus property disposal program.

Section 102 eliminates certain reports required of the Executive Office of the President.

Section 102(a) eliminates the requirement for a table in the budget showing proposals for legislation that would establish or expand a government activity.

Section 102(b) deletes the requirement that the Director of the Office of Management and Budget (OMB) provide an annual listing of every account containing unvouchered expenditures that are potentially subject to audit by the Comptroller General.

Section 103 eliminates two reports required of the Department of Agriculture.

Section 103(a) repeals a provisions of the Soil and Water Resources Conservation Act which requires that the President submit a report to Congress within 30 days of the submission of his annual budget, expressing in qualitative and quantitative terms, the extent to which the programs and policies projected under the budget meet the Presidential Statement of Policy submitted under section 7(a) of the act.

Section 103(b) repeals section 17(j) of the Child Nutrition Act of 1966 which directs the Secretary of Agriculture to prepare a report describing plans to ensure that eligible members of the migrant populations continue to participate in the special supplemental food program.

Section 104 eliminates certain reports required of the Department of Commerce.

Section 104(a) repeals a provision of the Federal Water Pollution Control Act Amendments of 1972 requiring that the Secretary of Commerce study and report to Congress on the effects that U.S. and foreign pollution abatement programs have on foreign production costs, market prices and international trade.

Section 104(b) deletes the requirement that the Secretary report annually to Congress on the condition of manufacturers, domestic trade, currency and banks of the several states and territories.

Section 104(c) amends two provisions of the Marine Protection, Research and Sanctuaries Act to delete the requirements that the Secretary report separately to Congress on the results of monitoring and research regarding the effects of dumping materials into 1) ocean waters, 2) other coastal waters where tides ebb and flow, or 3) into the Great Lakes or their connecting waters.

Section 104(d) repeals section 5(e) of the Fair Packaging and Labeling Act. This provision requires that the Secretary report to Congress upon his determination that a voluntary product standard has not been developed as he requested or that a published standard has not been observed by the industry.

Section 104(e) repeals a provision of the Saltonstall-Kennedy Act which required that the Secretary provide Congress with an annual report on the administration of the National Fisheries and Development Program.

Section 104(f) eliminates the Secretary's biennial report to Congress on the level of taking and the status of bluefin tuna stocks.

104(g) deletes the requirement that the Secretary report annually to Congess on activities pursuant to the Central, Western, and South Pacific Fisheries Act.

Section 105 eliminates certain reports required of the Department of Defense.

Section 105(a) eliminates the requirement that the Secretary of a military department provide written notice to the Armed Services Committees of the House and Senate at least 30 days in advance of acquiring an interest in land that is urgently needed in the interest of national defense when 1) the estimated fair market value is in excess of $100,000; and 2) the urgency is such that the acquisition cannot be included in an annual Military Construction Authorization Act.

Section 105(b) rescinds the requirement that the Secretary of a military department, or his designee, submit a report to the Armed Services Committees of the House and Senate before entering into the acquisition, lease, transfer or disposal of property exceeding $100,000.

Section 105(c) amends section 221 of the Flood Control Act of 1970 to eliminate the annual report required of the Secretary of the Army to Congress concerning the inventory of agreements between the Secretary and each nonfederal interest which will be reimbursed for construction of any water resource project sponsored by the Corps of Engineers.

Section 105(d) eliminates the requirement that the Secretary of a military department report to the Armed Services Committees of the House and Senate on leases in foreign countries if the average estimated annual rental during the term of the lease is more than $250,000.

Section 106 eliminates several reports required of the Department of Education.

Section 106(a) repeals the provision of the Higher Education Act of 1965 which directs the National Advisory Council on Continuing Education to report annually to the President, the Congress and the Secretary on its findings and recommendations.

Section 106(b) deletes the requirement that the Secretary submit a biennial report to Congress on the findings and recommendations of the Office of Education Professional Development.

Section 106(c) repeals a provision of the Higher Education Act of 1965 to eliminate the annual report requirement which included an index and analysis of the books or research materials produced under Title IV.

Section 106(d) repeals a provision of the Department of Education Organization Act to eliminate two reports on the allocation and use of work-years within the Department.

Section 106(e) amends a section of the Perkins Vocational Education Act of 1984 to delete an annual joint report to Congress from the Secretaries of Labor and Education on the status of bilingual vocational training. The report describes efforts by both departments to support bilingual vocational training and other programs for persons whose English speaking ability is limited.

Section 107 eliminates certain reports of the Department of Energy.

Section 107(a) amends a provision of the Federal Non-nuclear Energy Research and Development Act of 1974 to eliminate the report required of the Secretary prior to the establishment of any joint federal-industry experiment, demonstration or commercial corporation.

Section 107(b) deletes the requirements under the Department of the Interior and Related Agencies Appropriations for Fiscal Year 1980 Act which requires the Secretary to submit a report to Congress every six months detailing the activities carried out under the appropriation for the Special Energy Reserve Fund.

Section 107(c) amends the Powerplant and Industrial Fuel Use Act of 1978 to eliminate the requirement for an annual report on coal reserves disclosure.

Section 107(g) amends the Wind Energy Systems Act of 1980 to eliminate the report to Congress required by the Secretary concerning the study of prospects for application of wind energy systems in foreign countries.

Section 107(e) amends the Public Utility Regulatory Policies Act of 1978 to eliminate the requirement that the Secretary 1) report to Congress on rate design initiatives by nonregulated authorities, and 2) submit annual reports by nonregulated gas utilities and state regulatory authorities on the adoption and implementation of certain business practices, including service termination policies and the recovery of advertising costs.

Section 107(f) deletes the requirement that the Secretaries of Agriculture and Energy submit to Congress a comprehensive list of any private, state or federal benefits now in effect or proposed that can be used for the production of motor fuel or petroleum alcohol.

Section 107(g) deletes the requirement that the Secretaries of Energy report to Congress on the changes to the comprehensive management plan for the program established under the Nuclear Safety, Research, Development and Demonstration Act of 1980.

Section 108 eliminates certain reports required of the Department of Health and Human Services.

Section 108(a) repeals a provision of the Toxic Substances Control Act which provides that the Secretary report annually to Congress on the number, progress, and results of contracts and grants for developing and evaluating methods to measure the effects of toxic substances.

Section 108(b) amends the Public Health Service Act to delete the requirement that the Secretary report annually to Congress on health services research, health statistics, health care technology, and international cooperation in these fields, as well as in biomedical research.

Section 108(c) eliminates the requirement that the Secretary submit an annual report to the President, for submission to Congress, describing disease control activities.

Section 108(d) repeals a provision of the Public Health Service Act which requires that the Secretary submit an annual report to Congress on the National Health Services Corps.

Section 108(e) deletes the requirement that the Secretary report annually on the National Health Services Corps Scholarship Program.

Section 108(f) repeals a provision of the Public Health Service Act which requires that the Secretary periodically study and then report to Congress on 1) state and federal control of health hazards from electronic product radiation, 2) standards for the use of nonmedical electronic products, and 3) procedures for the detection and measurement of electronic product radiation.

Section 108(g) repeals a provision of the Public Health Service Act which requires that the Secretary make an annual report to the President for submission to Congress on the administration of the electronic product radiation control program.

Section 108(h) repeals a provision requiring the Secretary to report annually on the administration of the Public Health Service.

Section 108(i) amends the Public Health Service Act to delete the requirement that the Secretary report to the House Committee on Energy and Commerce and the Senate Committee on Labor and Human Resources on the number of filled first year positions in direct or affiliated medical residency programs at schools eligible to receive capitation grants.

Section 108(j) eliminates the requirement that the Secretary furnish the Congress each year with a five-year plan for population research and family planning.

Section 108(k) amends the section of the Public Health Service Act which requires the Secretary to transmit an annual report on sudden infant death syndrome and an annual estimate of funding for sudden infant death research.

Section 108(l) repeals a provision of the Public Health Service Act in order to eliminate the annual report on health maintenance organizations (HMOs) required from the Secretary.

Section 108(m) deletes the requirement that the Secretary report annually on HMO financial information, including insider transactions.

Section 108(n) eliminates the requirements that the Secretary submit to the President, for transmittal to Congress, an annual report on the status of health information and promotion, preventive health services and education in appropriate health care use. Also eliminated is the requirement that the Secretary study health education and preventive health services to determine the coverage of such services under both private and public health insurance programs.

Section 108(o) amends the Social Security Act provision which requires that the Secretary periodically submit legislative recommendations to further the use of home dialysis and transplantation by individuals suffering from end-stage renal disease.

Section 108(p) deletes the requirement that the Secretary report annually to the Senate Committee on Labor and Human Resources and the House Committee on Energy and Commerce on the activities of advisory councils established pursuant to the Public Health Service Act or the Mental Retardation Facilities and Community Health Center Construction Act of 1963.

Section 108(q) repeals a provision of the Runaway Homeless Youth Act which requires the Secretary to report annually to Congress on the status and accomplishments of the centers funded under the act.

Section 108(r) amends a section of the Head Start Act which requires the Secretary to submit an annual report to Congress on the status of handicapped children in Head Start programs.

Section 109 eliminates several reports required of the Department of Housing and Urban Development (HUD).

Section 109(a) repeals section 904 of the Housing and Community Development Act of 1977 which requires HUD to report annually on prototype housing costs for one- to four-family dwelling units for each housing market area of the United States.

Section 109(b) deletes section 311 of the Energy Conservation Standards for New Buildings Act of 1976 which requires the Secretary to 1) monitor the progress made by states and localities in adopting Building Energy Performance Standards (BEPS), 2) identify procedural obstacles or technical constraints inhibiting the implementation of these standards, 3) evaluate the effectiveness of the BEPS, and 4) report to Congress semiannually on these issues.

Section 109(c) eliminates the requirement that HUD submit, upon the request of Congress, evaluation reports on the application of solar energy to residential housing demonstration projects.

Section 109(d) repeals the provision which requires that the Secretary furnish Congress with an annual report on the status of HUD assisted housing abandonment demonstration projects.

Section 110 eliminates certain reports required of the Department of the Interior.

Section 110(a) amends section 522(b) of the Energy Policy and Conservation Act to delete the requirement for public disclosure of financial statements by officers and employees of the Department of the Interior, and the resulting report to Congress.

Section 110(b) amends the Outer Continental Shelf Lands Act to eliminate the requirement that Congress be provided with a report 30 days before any lease sale. This section also deletes the requirement for an annual report to Congress on the use of various bidding options.

Section 110(c) eliminates the provison which requires the submission of reports to Congress on the proposed disposition of a per capita share of any fund which has remained unpaid and unclaimed for more than six years.

Section 110(d) amends Public Law 87-279 to delete the reporting requirement for any proposed contract for sale, operation, maintenance, repair or relocation of facilities administered by the Bureau of Indian Affairs.

Section 110(e) eliminates the requirements that the Secretary of Interior provide a notice of reinstatement for any federal oil and gas lease, including background information, to the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources.

Section 111 amends Section 210(d) of title 18 of the United States Code which provides in part that the Department of Justice report to Congress when a determination is made not to seek prosecution of an individual under the riot act, 18 U.S.C. 2101(a).

Section 112 repeals section 4(e) of the Fair Labor Standards Act of 1938 which directs the Secretary of Labor to study and report to Congress whenever he has reason to believe that any industry covered by the act is adversely affected by foreign competition.

Section 113 eliminates several reports required by the Department of Transportation.

Section 113(a) repeals a provision of the Merchant Ship Sales Act of 1946 which requires that reports be submitted to Congress each year on all sales and chartering activities under the act.

Section 113(b) amends a section of the Federal Aid Highway Act of 1973 to eliminate the requirement that the Secretary submit a biennial report to Congress on railroad-highway crossing demonstration projects.

Section 113(c) eliminates the annual reports required by the Secretary to Congress on rail crossing programs.

Section 113(d) eliminates the annual reports required by the Secretary for the hazard elimination programs.

Section 113(e) eliminates the requirement that the Secretary report annually to Congress on the activities of the department.

Section 114 eliminates several reports required of the Department of Treasury.

Section 114(a) deletes the requirement that the Secretary submit an annual report on the statement of liabilities and other financial commitments of the United States.

Section 114(b) amends the Panama Canal Act of 1979 to eliminate the requirement that the Secretary submit an annual report of the financial condition of the Panama Canal Commission Fund.

Section 114(c) repeals a provision of the Right of Financial Privacy Act of 1978 which provides that each government authority report annually to Congress on any financial institution's request for access to customer financial records.

Section 115 repeals a provision of the Consumer Product Safety Act providing for a report to Congress on the enforcement of the Interim Safety Standards for cellulose insulation during the most recent six-month period.

Section 116 eliminates certain reports required of the Environmental Protection Agency.

Section 116(a) repeals a provision of the Solid Waste Disposal Act Amendments of 1980 which directed the National Advisory Commission on Resource Conservation and Recovery, established in the executive branch and appointed by the President, to submit an interim report in February of 1982.

Section 116(b) repeals the requirement set forth in the Solid Waste Disposal Act Amendments of 1980 that an Interagency Coordinating Committee, chaired by the EPA, submit to Congress an annual five-year action plan. The plan is to include proposals and/or programs to encourage resource conservation on material and energy recovery. In addition, this plan is to describe a coordinated and nonduplicatory federal program to achieve the aforementioned purposes.

Section 116(c) eliminates the requirement that a report be submitted (on a one-time basis) describing the trained personnel needed by the states and localities in order to implement the resource conservation program.

Section 116(d) amends a section of the Clean Air Act Amendments of 1977 to eliminate the requirement that the Administration report to Congress on the consequences of major emitting facilities and on the prevention of significant deterioration (PSD) in air quality. Furthermore, this section deletes the requirements that the Administrator study and then report to Congress on the progress made on PSD and any problems so related.

Section 116(e) repeals section 102(d) of the Federal Water Pollution Act which requires that the Administrator, after consultation with the states and river basin commissions established under the Water Resources Planning Act, submit a report to Congress which analyzes the relationship between programs and under that statute and other programs by which states and federal agencies allocate quantities of water.

Section 116(f) eliminates the requirement that the EPA Administrator submit a report once every six years on the effects of pollution in estuaries and estuarine zones of the U.S.

Section 116(g) eliminates the requirement that the Administrator report annually on measures taken toward the objectives of the Clean Water Act.

Section 116(h) repeals a provision of the Used Oil Recycling Act of 1980 to delete the requirement that the Administrator, in conjunction with the Secretaries of Energy and Commerce and the Federal Trade Commission, conduct a study of environmental problems associated with used oil recycling.

Section 116(i)(1) repeals a provision of the Public Health Service Act to eliminate the regulation that the Administration study and report periodically to Congress on the costs of implementing the National Interim Primary Drinking Water Regulations under the Safe Drinking Water Act. Subsection (2) eliminates the requirement that the Administrator submit a report to Congress by May 1979 identifying the anticipated costs of compliance with interim and revised national primary drinking water regulations. Subsection (3) amends the Public Health Service Act by eliminating the requirement that the Administrator report to Congress on the present and projected availability of an adequate and dependable supply of safe drinking water.

Section 116(j) eliminates the requirement that the Administrator report to Congress on the results of a study with the National Academy of Sciences to determine maximum safe contaminant levels in the drinking water.

Section 116(k) eliminates the requirement that the Administrator, not later than April 1 of each year, submit a report on the activities pursuant to the Safe Drinking Water Act. This section further deletes the requirement that the Administrator recommend necessary legislation and submit a statement on the actual and anticipated costs incurred by state public water systems in their efforts to comply with the act.

Section 116(1) repeals a provision of the Federal Water Pollution Control Act requiring that the Administrator conduct an annual survey to determine the efficiency of the operation and maintenance of treatment works constructed with grants awarded under the act, as compared to the efficiency planned at the time the grant was made.

Section 117 repeals the Communications Act of 1934 to eliminate the Annual Management Report to Congress from the Federal Communications Commission.

Section 118 repeals the requirement that the Federal Labor Relations Authority report annually to Congress as to the cases it has heard and the decisions it has rendered.

Section 119 eliminates the requirement that the Administrator of the General Services Administration report biennally to Congress on the progress it has made in meeting the objectives of the Federal Property and Administrative Services Act.

Section 120 repeals the requirement that the Interstate Commerce Commission (ICC) report to Congress annually on the extent to which consumers are realizing savings as a result of the Act's provisions authorizing food and grocery sellers to reduce the prices of those goods by the actual amount of the transportation costs if the consumer picks up the goods.

Section 121 repeals section 21(f) of the Small Business Act which requires that the National Aeronautics and Space Administration provide Congress with an annual report 1) outlining cooperative efforts between NASA's Industrial Application Centers (IAC's) and the Small Business Development Centers, and 2) describing ways to strengthen the IAC network.

Section 122 eliminates the requirement that the National Science Foundation make quarterly reports to Congress on the activities of its Office of Small Business Research and Development.

Section 123 repeals a provision of the Energy Reorganization Act of 1974 which directs the Nuclear Regulatory Commission (NRC) to prepare and submit to Congress a quarterly report documenting the steps taken by NRC to meet the provisions of the Equal Employment Act.

Section 124 deletes the requirement that the Office of Personnel Management submit a report by February 1 of each year to the House Committee on Post Office and Civil Service and the Senate Committee on Governmental Affairs which lists the following: (1) the positions in GS-16, GS-17, and GS-18; (2) the name, rate of pay, description of qualifications, position title, and statement of duties and responsibilities of each incumbent; (3) positions held by each incumbent in or outside government; and (4) the rates of pay for each incumbent for the five year period preceding the appointment to the present position.

Section 125 amends section 10 of the Small Business Act. Under this section, the Small Business Administration (SBA) is required to transmit, no later than December 31 of each year, to Congress a sealed report of complaints alleging illegal conduct by SBA employees which were received or acted upon the Administration during the preceding fiscal year.

Title II modifies existing report requirements.

Section 201 modifies certain reports required of more than one agency.

Section 201(a) amends the requirement that the Secretaries of Interior and Health and Human Services each submit an annual report on measures taken to recruit and train Indians for Indian preference positions. The report will now be submitted biennially, with additional information provided between reporting periods as necessary.

Section 201(b) amends the requirement that the Secretaries of Interior and Health and Human Services annually report to Congress on actions taken to transfer non-Indian employees in the Bureau of Indian Affairs and the Indian Health Service to other positions. This report will be submitted biennally, with information provided between reporting periods if requested.

Section 201(c) amends the Occupational Safety and Health Act of 1970 which requires the Secretaries of Labor and Health and Human Services to each submit a report on occupational safety and health. The amendment would make the report biennal and would also eliminate a specific due date.

Section 201(d) modifies the biennial report required by the Secretaries of Interior and Agriculture on the administration of the Wild Horses and Burrors Act of 1971. This section provides that a joint statement on the administration of this act be included in the agencies' respective annual reports.

Section 202 modifies one report required of the Executive Office of the President. This section amends the annual reporting rquirement contained in title 31, section 9503 of the United States Code to require that federal pension plans be submitted every five years.

Section 203 modifies one report required of the Department of Agriculture. This section amends the requirement that the General Sales Manager submit quarterly reports to the respective chairmen of the House and Senate Budget and Agriculture Committees. An annual report is to be submitted in lieu of the quarterly report.

Section 204 modifies several reports required of the Department of Commerce.

Section 204(a) amends the Marine Resources and Engineering Development Act of 1966 to require that the Secretary submit a biennial report, in lieu of an annual report, on his actions under the act.

Section 201(b) amends the Foreign Trade Zones (FTZ) Act of 1934 to reduce the reporting requirements on zone grantees and/or on the Board by eliminating 1) reports required of the Zone and the FTZ Board concerning Zone finances, and 2) the requirement that Zone reports be attached to the Board's report to Congress.

Section 204(c) amends the National Climate Program Act which requires the Secretary to revise the National Climate Plan on a biennial basis. Under this section the Secretary is required only to review the plan every year and revise it as appropriate.

Section 204(d) amends the Marine Protection, Research and Sanctuaries Act of 1972 to require a biennial report in lieu of the annual report on research activities with respect to the possible long-term effects of 1) pollution, 2) over-fishing and 3) man-induced changes to ocean ecosystems.

Section 205 modifies certain reports required of the Department of Education.

Section 205(a) amends Public Law 81-815 to provide for a report by the Commissioner, every two years instead of every year, concerning the administration of his functions under the act, including a detailed statement of receipts and disbursements.

Section 205(b) amends the Education of the Handicapped Act to delete the requirement that the Secretary evaluate the procedures of each state and local education agency and intermediate education unit, but retains the requirement for an aggregate evaluation of effectiveness.

Section 205(c) modifies the requirement that the Secretary report annually to Congress on the activities of Centers on Education Media and Materials for the Handicapped. This section requires the Secretary to report to Congress on the Centers' activities every three years.

Section 206 modifies certain reports required of the Department of Health and Human Services.

Section 206(a) amends the International Health Research Act of 1960 to require that the President report to Congress on international health research activities biennially rather than annually, with updates provided between reporting periods as requested.

Section 206(b) amends the Occupational Safety and Health Act of 1970 to require the Director of the National Institute of Occupational Safety and Health to submit a biennial report in lieu of an annual report on the operations of the Institute.

Section 206(c) requires that the Secretary biennially rather than annually publish a report on carcinogens.

Section 206(d) amends the Public Health Service Act to delete the requirement that the annual report on the National Cancer Program be submitted by the Director by November 30 of each year.

Section 206(e) requires the Director of the National Institute of Arthritis, Diabetes, and Digestive and Kidney Diseases to submit a biennial report instead of an annual report on the Institute's activities.

Section 206(f) requires the Secretary to report biennially rather than annually on the activities of diabetes research and training centers.

Section 206(g) amends a provision of the Public Health Service Act to require that the Secretary submit a biennial report in lieu of an annual report on multipurpose centers.

Section 206(h) amends the provisions of the Age Discrimination Act of 1975 which requires the heads of federal departments to submit reports to the Secretary, who in turn reports to Congress. This section provides for such reports after 1984 only as the Secretary deems necessary.

Section 207 modifies two reports required by the Department of Justice.

Section 207(a) amends the Federal Property and Administrative Services Act of 1949 (as amended by the Act of August 14), 1958 in order to: (1) change the basis for evaluating the monetary limit for both real and personal property from acquisition cost (plus capital expenditures in the case of real property) to the estimated appraised fair market value; and (2) establish a minimum value of $3,000,000 for both real and personal property as the prerequisite to requiring the Attorney General's advice as to the antitrust implications of such property's disposition.

Section 207(b) modifies the requirement for a semi-annual report by the Attorney General and the Federal Trade Commission to require that such report be made every other year on an alternating basis. The report discusses the impact of actions authorized by the International Voluntary Agreements section of the Energy Policy and Conservation Act on competition and small business.

Section 208 modifies two reports required of the Department of Transportation.

Section 208(a) amends the Federal Aviation Act of 1958 to require that the Secretary submit annual reports to Congress and the

Civil Aeronautics Board on June 30 instead of January 31 of each year. These reports discuss the extend to which the implementation of the Airline Deregulation Act of 1978 has or will affect the level of safety. The reports also recommends the level of surveillance necessary to enforce air safety regulations.

Section 208(b) requires the Administrator of the Federal Aviation Administration to submit annual reports rather than semi-annual reports on the effectiveness of the civil aviation security program.

Section 209 modifies two reports required of the Department of the Treasury.

Section 209(a) transfers the primary responsibility for preparing the annual report on Fishery Allocations, Permits and Foreign Import Barriers from the Secretary of the Treasury to the Secretaries of Commerce and State.

Section 209(b) amends the Internal Revenue Code to make the Report on Procedures and Safeguards an annual rather than a quarterly report.

Section 210 modifies two reports required of the General Services Administration.

Section 210(a) amends a provision of the Architectural Barriers Act of 1968 to require that the Administrator report biennially rather than annually to Congress on activities undertaken to facilitate access to public buildings by persons with physical handicaps.

Section 210(b) amends the Federal Property and Administrative Services Act of 1949 to require that the Administrator submit a report to Congress showing the acquisition cost of all donated personal and real property which exceeds $5,000 rather than $3,000.

Section 211 modifies a report required of the United States Merit Systems Protection Board. The section amends the Civil Service Reform Act of 1978 to allow the Board to use fiscal year data, which it otherwise collects and reports, for the analysis and reporting required under Title 5, section 7701(i)(2) of the U.S. Code.

VI. ESTIMATED COST OF LEGISLATION

U.S. Congress,
Congressional Budget Office,
Washington, DC, December 5, 1985.

Hon. William V. Roth, Jr.,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 992, the Congressional Reports Elimination Act of 1985, as ordered reported by the Senate Committee on Governmental Affairs, November 22, 1985.

The bill would reduce the number of reports Executive Branch agencies are required to submit to the Congress, the President, or the public, and would also modify some remaining reporting requirements. A total of 127 reports would be eliminated or modified by the bill.

Based on information from affected agencies, we estimate the potential annual savings that would result from this bill to be about $5 million, which could be reflected either in reduced spending or in a reallocation of resources to other activities.

If you wish further details on the estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

Rudolph G. Penner.

VII. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirement of paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory and paperwork impact of S. 992.

In fiscal year 1985, 3,300 reports were required by law to be submitted to Congress by various executive agencies and departments. The paperwork generated by these requirements are significant. S. 992, as reported, eliminates or modifies 127 of these reports, thereby reducing the administrative burden placed on federal agencies.

The objectives of S. 992 are to discontinue or amend congressional reporting requirements which are either duplicative of other reports submitted to Congress or are considered to be no longer necessary. The legislation contributes to the economical operation of federal government activities by streamlining the information that flows from the agencies to Congress.

VIII. COMMITTEE ACTION

On November 22, 1985, the Committee on Governmental Affairs approved S. 992, as mended, the following Members indicating approval: Roth, Stevens, Mathias, Cohen, Durenberger, Rudman, Cochran, Eagleton, Chiles, Nunn, Glenn, Levin, and Gore. No Members indicated disapproval.

IX. CHANGES IN EXISTING LAW

In accordance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, the Committee has determined that it is necessary to dispense with the requirements of this subsection to expedite the business of the Senate.

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Calendar No. 455

99TH CONGRESS
1st Session

SENATE

REPORT
99-212

THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1985

DECEMBER 10 (legislative day, DECEMBER 9), 1985.—Ordered to be printed

Mr. ROTH, from the Committee on Governmental Affairs, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 1134]

To provide administrative civil remedies for false claims and statements made to the United States, by certain recipients of property, services or money from the United States, by parties to contracts with the United States, or by Federal employees, and for other purposes.

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The Committee on Governmental Affairs, to which was referred the bill (S. 1134) to provide administrative civil remedies for false claims and statements made to the United States by certain recipi-

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ents of property, services, or money from the United States, by parties to contracts with the United States, or by Federal employees, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

I. PURPOSE

The purposes of S. 1134, the Program Fraud Civil Remedies Act, are to provide Federal agencies with an administrative remedy to recompense them for losses resulting from false claims and statements, to permit administrative proceedings to be brought against persons who submit false claims or statements, to deter such fraudulent behavior in the future, and to provide due process protections to all persons who are subject to the administrative adjudication of false claims and statements.

II. BACKGROUND

Fraud in Federal programs is pervasive—affecting benefit and assistance programs, such as food stamps, welfare, and student loans, as well as programs for mortgage insurance, crop subsidies, disaster relief, and the like. A 1981 General Accounting Office (GAO) report, "Fraud in Government Programs: How Extensive is It? How Can It Be Controlled?," documented over 77,000 cases of fraud and other illegal activities reported in 21 agencies during a three-year period.

Procurement fraud, in particular, has seemingly flourished in the past few years with the plethora of reports on mis-charging, cross-changing, and egregious over-charging. In April 1985, the Department of Defense Inspector General (IG) testified before the House Energy and Commerce Subcommittee on Oversight and Investigations that 45 of the nation's 100 largest defense contractors are under investigation by the federal government.

The monetary loss to the government resulting from fraud is not calculable, but certainly substantial. The 1981 GAO report estimated losses to the government of between $150 and $200 million annually, not including the potential hundreds of millions of dollars lost to fraud that go undetected. Joseph Sherick, the DoD IG, has estimated that the Defense Department alone loses between "$500 million to $1 billion a year from unscrupulous contractors." Based on these and other estimates, the Committee believes that fraud costs the federal government hundreds of millions of dollars each year, and a substantial portion of this sum is never recovered.

Beyond the actual monetary loss, fraud in federal programs erodes public confidence in the administration of these programs. Even when no financial loss is apparent—such as when food stamps are used to purchase prohibited items or a non-veteran obtains a VA guaranteed loan—the integrity of the program is seriously undermined. Worse yet, in the case of military procurement, fraud could threaten defense readiness and, ultimately, national security.

Given these actual and potential consequences, much has been done to combat fraud against the government. According to Administration data, the government recovered nearly $273 million during the past four years resulting from over 10,200 fraud prosecutions.

Congressional and administrative actions taken in past years have contributed to this effort. In 1978, Congress passed the Inspector General Act, which established an Office of Inspector General in twelve departments and agencies to serve as independent overseers of those departments' and agencies' activities. The IGs typically do the investigative groundwork on cases that are then referred to the Justice Department and to the U.S. Attorneys for prosecution. Several departments, including the Department of Health and Human Services, had statutory Inspectors General prior to 1978, while in other departments, most notably the Department of Defense, Congress has since created statutory IGs.

The Administration, too, has recognized the need to fight fraud in Federal programs. President Reagan, in his first State of the Union address, emphasized this need:

> Waste and fraud are serious problems. . . . Not only the taxpayers are defrauded, the people with real dependency on these programs are deprived of what they need because available resources are going to the greedy. The time has come to control the uncontrollable.

As a first step, March 1981, the President issued an Executive Order creating the President's Council on Integrity and Efficiency (PCIE), which is chaired by the Deputy Director of the Office of Management and Budget and is comprised of all the statutory IGs, the Deputy Attorney General, the Executive Assistant Director of Investigations at the Federal Bureau of Investigations, and the Director of the Office of Personnel Management. The PCIE was directed to develop plans for coordinating governmentwide activities to attack fraud, waste, abuse, and mismanagement. Through this coordinated effort, the PCIE is able to address problems that individual IGs cannot. During the past four years, Administration data show that PCIE's efforts have resulted in $54 billion in recoveries or funds being put to better use.

In August 1982, as a step toward curtailing procurement fraud, the Department of Justice, along with the Department of Defense, established a Defense Procurement Fraud Unit in the Fraud Section of DoJ's Criminal Division. This unit brings together prosecutors, investigators, and auditors from the Departments of Justice and Defense, with the support of the Federal Bureau of Investigations, the DoD IG, the military services, the Defense Logistics Agency, and the Defense Contract Audit Agency. Like the PCIE, this Unit is designed to coordinate Administrative efforts, in this case, to identify, investigate, and prosecute procurement fraud cases. Since its inception, the Defense Procurement Fraud Unit has had 20 procurement fraud convictions and, through November 1984, has been instrumental in the suspensions and debarments of 47 individuals and corporations. The DoJ Civil Division has, since the beginning of last year, obtained recoveries through settlements and judgments in 12 procurement fraud cases, totaling approximately $11 million, with other $60 million in potential recoveries pending in other cases.

Another sanction used effectively to combat fraud in certain Federal programs is the administrative—rather than judicial—imposition of civil monetary penalties.

The Civil Monetary Penalties Law (CMPL) has been used successfully to recover money lost to Medicare and Medicaid fraud. Enacted as part of the 1981 Omnibus Budget Reconciliation Act, the CMPL authorizes the Department of Health and Human Services to impose penalties and assessments against health care providers who knowingly or with reason to know submit claims for services not provided as claimed.

The HHS IG, Richard Kusserow, has testified that, prior to the enactment of the CMPL, there was simply no effective sanction in many Medicare and Medicaid fraud cases, particularly when it appeared that the cost of pursuing these cases through the courts exceeded the amount of damages or the probable recovery by the government. Since implementation of the CMPL, HHS has been able to recover over $15 million resulting from 117 settlements and litigated cases. In the first decided case under CMPL in May 1985, an administrative law judge imposed a civil penalty and assessment of $156,136 against a person found liable for filing false Medicaid claims. The HHS obtained an administrative order in the second decided case for payment of $1,791,000.

The CMPL applies only to the Medicare, Medicaid, and Maternal and Child Health programs administered by the Department of Health and Human Services. Civil monetary penalties are, however, widely used by other federal agencies to enforce government standards. In March 1984, the Office of Administrative Law Judges of the Department of Labor complied a list of approximately 200 statutes authorizing the administrative imposition of civil penalties. The Department of Agriculture, for example, can impose a maximum penalty of $10,000 for each violation of federal regulations governing the treatment of garbage fed to swine. Liability is determined after a hearing conducted pursuant to the Administrative Procedure Act, and the final decision of the Secretary of Agriculture can be appealed to a U.S. Court of Appeals. Similarly, the Commerce Department has statutory authority to impose fines of up to $25,000 for each mineral lease violation.

Despite the success of the CMPL experiment in HHS and the widespread use of administratively imposed civil penalties by other agencies, there currently is no governmentwide statute authorizing Federal agencies to bring administrative proceedings against individuals who submit false claims or statements to the government. S. 1134, the Program Fraud Civil Remedies Act, should provide Federal agencies with an administrative remedy to handle certain small-dollar false claims and statements.

III. NEED FOR LEGISLATION

Current judicial remedies available to penalize and deter fraudulent behavior—primarily in the small-dollar cases—are often not used. The imposition of criminal and civil penalties for false claims and statements requires the Department of Justice to file suit in Federal court. The criminal and civil False Claims Acts (18 U.S.C. § 287; 31 U.S.C. § 3729), as well as the criminal False Statements

Act (18 U.S.C. § 1001), are the principal litigative tools employed by the Justice Department to penalize persons who defraud the government and to recoup losses sustained as a result of such fraud. Because the Justice Department focuses its prosecutorial efforts on those cases in which the government has suffered a substantial and identifiable monetary loss, however, the government is often left without an adequate remedy for the small-dollar fraud cases.

The 1981 General Accounting Office report on fraud in Federal programs documented this problem. In its review of 77,000 fraud cases, the GAO found that of those cases referred to the Justice Department, more than 60 per cent were declined for prosecution. The GAO further noted that the Justice Department, when it did take action, failed to consider appropriate civil remedies to make the government whole for the loss suffered. By failing to prosecute over 60 per cent of the false claim and statement cases, the government not only stands to lose "tens, if not hundreds, of millions of dollars annually," according to Richard Willard, Assistant Attorney General for the Civil Division, but also public confidence in its programs.

This failure to prosecute and to recover money lost to fraud, some maintain, is the result of a prosecutorial resource problem; that is, the Justice Department needs more resources to investigate and prosecute these false claim and statement cases under existing laws. The Committee does not believe, however, that providing more resources to the Justice Department would alone solve this problem. Rather, the Committee believes that the Justice Department's high declination rate is more a function of costs outweighing benefits—the costs of litigating a small-dollar fraud case will almost always exceed the benefits of recovery, thus making it economically impractical for the Justice Department to go to court. Mr. Willard, as well as his predecessor, J. Paul McGrath, have agreed in testimony before the Committee that the problem lies more with the economics of allocating existing resources than the need for more resources.

Another impediment to prosecuting small-dollar fraud cases is the burden this large volume of cases would impose on the already overcrowded dockets of the Federal courts. According to the Administrative Office of the United States Courts, the workload of the Federal courts continues to increase. This year, the number of criminal false claim and statement cases filed in Federal district courts rose by 23 percent over 1984, and by 77 percent over those filed in 1981. Since criminal indictments typically precede the initiation of a companion civil case, these statistics foreshadow a continuing and substantial increase in civil fraud cases during the remainder of the decade.

Recent cases involving General Dynamics and General Electric are visible examples of fraud in government programs. The Committee found, however, that the more typical fraud case involves fewer dollars, draws little public attention, and is therefore less likely to be prosecuted. The following are examples of small-dollar fraud cases, compiled by the President's Council on Integrity and Efficiency, which were declined by the Justice Department for prosecution:

In a case involving the National Aeronautics and Space Administration, the president of a small business allegedly charged personal expenses through the company's overhead accounts to a NASA cost-reimbursable contract. These personal expenses, purportedly related to official business, consisted of false claims on public vouchers totaling $27,000, including costs associated with personal use of a Mercedes Benz and a Cadillac. Since government auditors disallowed the expenses on the NASA contract, the Assistant U.S. Attorney declined prosecution on the grounds that there was no financial loss to the government.

The Defense Department developed a case in which a contractor, who operated a parts store on ten different military bases, was suspected of illegally inflating parts prices on each contract. While the total alleged fraud amounted to over $50,000, no single base was defrauded for more than $6,000. Each of the nine cases was presented to a separate U.S. Attorney and was declined at each office because the dollar value was too low.

The Department of Interior found that a contractor purportedly submitted inflated billings in connection with services performed under a contract with the Bureau of Indian Affairs. Total overbillings were in the vicinity of $40,000. In another case, an insurance company allegedly submitted inflated false financial statements required to obtain a license to do business, resulting in government approval of the license application. Both cases were declined for criminal and civil prosecution because of the low dollar value.

The Naval Investigative Service identified over $600,000 in suspected fraudulent overpayments on a base maintenance contract. The Navy believed that the contractor deliberately overbilled the Service on numerous items but, because of evidentiary problems, decided to seek criminal prosecution on only $25,000 in false claims. The Justice Department subsequently declined both criminal and civil prosecution, again based on the low dollar amount involved.

Finally, at the Small Business Administration, frauds involving the small business reserve program as well as the set-aside program for small businesses owned and controlled by socially and economically disadvantaged persons are often declined for prosecution because the monetary loss to the government is difficult to substantiate.

These cases demonstrate, in the Committee's judgment, that existing remedies are not adequate to cope with the problem of fraud in Federal programs. The Committee, therefore, believes that an alternative administrative remedy is needed to adjudicate small-dollar false claim and statement cases that otherwise would not be initiated civilly.

Such an administrative remedy would provide numerous benefits, the first and foremost being that it would allow the government to recover money that, up until now, has been irretrievably lost to fraud. Second, it would establish a more expeditious and less expensive procedure to recoup losses, compared with the extensive investments of time and resources required to litigate in Federal court. Finally, an administrative remedy would serve as a deterrent against future fraud by dispelling the perception that small-dollar frauds against the government may be committed with impunity.

The GAO, in its 1981 report on program fraud, recommended that legislation should be enacted "to give the agencies the authority to levy civil monetary penalties." This proposal has also long been supported by the Administrative Conference of the United States, an independent Federal agency established by Congress to study and make recommendations for improving "the efficiency, adequacy, and fairness of the administrative procedure used by administraive agencies in carrying out administrative programs." A 1972 report prepared for the Administrative Conference, "An Evaluation of the Present and Potential Use of Civil Money Penalties as a sanction by Federal Administrative Agencies," found that civil money penalties "provide an ideally flexible sanctioning tool." Such an administrative mechanism would, according to the administrative Conference report:

> Avoid the delays, high costs, and jurisdictional frictions inherent in the traditional and most common system of imposing civil money penalties by a court in a civil action initiated on behalf of the agency by the Justice Department.

The 91-member Administrative Conference subsequently adopted a recommendation, based on this report, in favor of the use of civil money penalties. Recommenation 72-6 states that (1) Federal administrative agencies should evaluate the benefits which may be derived from the use (or increased use) of civil money penalties as a sanction, and (2) civil money penalties are often particularly valuable, and generally should be sought, to supplement those more potent sanctions already available to an agency. The recommendation further asserts that the benefits of civil penalties could best be achieved by an "administrative imposition system," whereby the agency adjudicates the violation and assesses the penalty—after a hearing on the record pursuant to the Administrative Procedure Act (APA)—subject to judicial review.

A follow-up report prepared in 1979 for the Administrative Conference, "The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies," focuses on the agency's role in imposing these penalties. This report found that, since the adoption of the Administrative Conference recommendation in 1972, "the use of civil money penalties in general and of administratively imposed civil money penalties in particular has increased significantly."

The Administrative Conference felt it important that agencies should improve the consistency, efficiency, and openness of the penalty imposition process, and adopted a recommendation to establish appropriate standards. Recommendation 79-3 set forth standards for (1) determining penalty amounts, (2) assessing penalties, (3) establishing agency mitigation procedures, and (4) using evidentiary hearings to impose civil penalties where such a procedure, though not required by statute, might result in a limited scope of judical review. The proposed standards for evidentiary hearings comport with the Administrative Conference's 1972 recommendation that "it is desirable that agencies be given express authority to employ the procedures of adjudication on the record pursuant to the APA for the imposition of civil money penalties."

IV. HISTORY OF S. 1134

S. 1134, the Program Fraud Civil Remedies Act, which was introduced on May 15, 1985, by Senators William S. Cohen, William V. Roth, Jr., Sam Nunn, Carl Levin, and Lawton Chiles, effectively implements the Administrative Conference's recommendations. As reported by the Committee, S. 1134 establishes an administrative mechanism, employing APA requirements and due process protections, to adjudicate small-dollar fraud cases under $100,000 that the Justice Department has declined to litigate. A person can be found liable under the bill if he or she "knows or has reason to know" that the claim or statement submitted is false. This finding is based on a "preponderance of the evidence," the standard applied in most civil litigation and administrative proceedings. The penalty, if the person is found liable, would be up to $10,000 for each false claim or statement plus double the amount falsely claimed. A finding of liability could be appealed within the agency and ultimately to a U.S. Court of Appeals.

Senator Roth, the chairman of the Committee, along with Senators Cohen, Nunn, Levin, and Chiles, sponsored similar measures in previous years: S. 1780 in the 97th Congress and S. 1566 in the 98th Congress. Testimony over the years has emphasized the need for this legislation.

In the 97th Congress, the Governmental Affairs Committee held a hearing on April 1, 1982, to consider S. 1780. The Committee received testimony from Milton Socolar, Special Assistant to the Comptroller General, General Accounting Office; J. Paul McGrath, Assistant Attorney General for the Civil Division, Department of Justice, Richard Kusserow, Inspector General of the Department of Health and Human Services; and Joseph Sherick, Inspector General of the Department of Defense—all of whom supported the legislation. Mr. Socolar testified that "the mechanism to impose civil penalties against those who knowingly make false claims or statements . . . would improve the government's fraud fighting arsenal." Mr. McGrath agreed, adding that "the ability to impose effective monetary sanctions on those who defraud the government is both a useful deterrent and an efficacious means of recovering damages which the government has suffered."

The Committee held a hearing on S. 1566 in the 98th Congress on November 15, 1983, at which Messrs. Kusserow, McGrath, and Sherick testified, as did Jed Babbin of the Shipbuilders Council of America and Wilsie Adams respresenting the National Security Industrial Association. The government witnesses again supported the legislation, while the industry witnesses did not. Mr. Sherick testified that "it is necessary to have a procedure within DoD to appropriately address those instances of fraud which the Department of Justice is unable to prosecute, but which clearly impact upon the integrity of our programs." Mr. Kusserow, who testified on the success of the HHS civil monetary penalty law, stated that legislation is needed "as a way to control fraud and abuse that exists in [government] programs."

Industry witnesses, however, questioned the very need for legislation in light of what they considered to be adequate remedies already available to deal with procurement fraud. Both witnesses specifically expressed concerns that the legislation would penalize individuals for false claims that were inadevertently submitted to the government or for otherwise legitimate contract disputes. They also raised the fear that a finding of liability resulting from the administrative proceeding could trigger an automatic debarment or suspension of the offending contractor. Finally, concerns were raised over the adquacy of the due process protections afforded to individuals subject to the administrative proceeding.

In response to these concerns, the bill was significantly revised before its reintroduction in the 99th Congress to accommodate those criticisms which the sponsors believed to be legitimate. The most significant revisions include: (1) rewriting the liability section to require knowledge of the falsity of the claims and statements and to exclude legitimate contract disputes; (2) clarifying that a determination of liability resulting from the administrative proceeding may be grounds for commencing a subsequent administrative action (e.g., debarment, suspension, or other disciplinary action), but will not serve as an automatic trigger for taking such action; and (3) strengthening the due process protections afforded to persons subject to the administrative proceedings.

The revised bill, S. 1134, was considered in this Congress by the Oversight of Government Management Subcommittee. The Oversight Subcommittee held a hearing on S. 1134 on June 18, 1985, at which the following witnesses testified: Richard Willard, Assistant Attorney General for the Civil Division, Justice Department; Mr. Kusserow; Derek Vander Schaff, Deputy Inspector General of the Department of Defense; Karen Hastie Williams representing the Public Contract Law Section of the American Bar Association; and Rhett Dawson testifying on behalf of the Aerospace Industries Association of America.

Again, the government witnesses strongly endorsed the legislation. Mr. Kusserow, testifying on behalf of the President's Council on Integrity and Efficiency, stated that "this administrative authority is a sorely needed alternative to judicial resolution of fraud against the government." Mr. Willard summed up the Administration's position by stating that "a mechanism for resolution of many fraud matters through administrative proceedings is long overdue."

The American Bar Association, which had opposed earlier program fraud bills, testified that S. 1134 is a "significant improvement" over these bills and agreed with the Administration witnesses that there is a need for an administrative mechanism to handle small-dollar fraud cases. Ms. Williams testified that:

> There is no cost-effective remedy available to the United States to obtain compensation in fraud cases involving small amounts of money. In such cases, the cost of court litigation using existing remedies may exceed the possible recovery. The administrative remedy which would be created by S. 1134 constitutes a reasonable response to this problem.

The ABA, however expressed concern over specific provisions of the bill—including the link between a Program Fraud finding of liability and suspension and debarment, the magnitude of the possible penalties, and the grant of testimonial subpoena authority to investigating officials—and offered constructive recommendations for improving the bill.

The defense industry, represented at the Oversight Subcommittee's hearing by the Aerospace Industry Association (AIA), remained steadfastly opposed to the bill. While Mr. Dawson recognized in his testimony that "fraud is a wrong that deserves redress" and that S. 1134 "address[es] this wrong in a manner that is an improvement upon its predecessors," he nevertheless expressed "serious doubts that S. 1134 . . . is the vehicle by which that wrong is properly righted." In testimony submitted for the Oversight Subcommittee's hearing record, the National Security Industrial Association, the Shipbuilders Council of America, and the Machinery and Allied Products Institute expressed similar concerns.

The Committee thoroughly considered the recommendations for improving S. 1134 made by the Administration witnesses, the ABA Public Contract Law Section, the defense industry associations, and other interested individuals and groups, and adopted amendments to incorporate many of these recommendations. These improvements, in addition to those changes made to the bill prior to its introduction, reflect the Committee's desire not only to establish an administrative remedy for small-dollar frauds, but to ensure that the proceedings authorized by the bill are fair to those accused of wrongdoing.

On August 1, 1985, the Oversight Subcommittee voted 4 to 0 to report S. 1134 favorably, with amendments. At a markup session on November 19, 1985, the Governmental Affairs Committee, a quorum being present, reported S. 1134 favorably by a voice vote, with an amendment in the nature of a substitute.

V. Provisions of S. 1134

The Program Fraud Civil Remedies Act provides an alternative administrative process for adjudicating small-dollar fraud cases and false statement cases upon which the Justice Department declines to bring suit. As an administrative counterpart to the civil False Claims and the criminal False Statements Act, S. 1134 would *not* create a new category of offenses. Rather, it is intended to capture only that conduct already prohibited by federal criminal and civil statutes which could be litigated in court but is not.

Under the Program Fraud bill, a typical case would begin with an investigation conducted by the agency's investigating official, usually the Inspector General. Any findings would be transmitted to the agency's reviewing official, who would independently evaluate the allegations to determine whether there is adequate evidence to believe that a false claim or statement has been submitted.

If so, the matter would be referred to the Justice Department for consideration. Only if the Attorney General or a designated Assistant Attorney General either approves the referral to the agency or takes no action to disapprove it would further administrative action ensue. This procedure, in effect, assures that the Justice Department will have an opportunity to review the charges and elect, if it so chooses, to litigate in Federal court. If the Department either approves or does not disapprove the referral to the agency, the reviewing official would notify the person alleged to be liable of the charges and of his or her right to a hearing. The reviewing official also is authorized to compromise or settle any allegations of liability against a person up to the time that the hearing examiner issues a decision.

If the person alleged to be liable requests a hearing, the agency's hearing examiner, an Administrative Law Judge, would conduct a hearing to determine whether or not the person is liable and the amount of penalty and assessment, if any, to be imposed. The hearing itself would be conducted according to the due process safeguards of the Administrative Procedure Act.

In addition to these protections, persons alleged to be liable would also be afforded discovery rights to the extent that the hearing examiner determines that discovery is necessary for the expeditious, fair, and reasonable consideration of the issues. Finally, the person would have the right to appeal the final agency determination to the U.S. Court of Appeals.

The major provisions of S. 1134 would:

A. APPLY TO ALL AUTHORITIES

S. 1134 authorizes all "authorities," as defined in section 801(a)(1), to establish administrative mechanisms for adjudicating false statement and small-dollar false claim cases. "Authority" is a new term in the litany of Title 5 terms, which combines executive departments, military departments, establishments as defined in the Inspector General Act of 1978, and the U.S. Postal Service.

The departments and agencies that would be considered "authorities" for purposes of this Act are: the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Energy, Education, Housing and Urban Development, Transportation, the Army, Navy, and Air Force, the Agency for International Development, the Environmental Protection Agency, the General Services Administration, the National Aeronautics and Space Administration, the Veterans Administration, the Small Business Administration, the Railroad Retirement Board, and the U.S. Postal Service. The term "authorities" does not, however, include regulatory agencies, such as the Federal Communications Commission and the Consumer Products Safety Commission.

While S. 1134 requires each authority to promulgate regulations for implementing the Act, the Committee does not intend that all authorities, particularly the smaller ones, should necessarily establish their own administrative mechanisms. As in the case with the Boards of Contract Appeals (BCAs), where one agency often uses another's BCA to hear a contract disrupte, the Committee intends that an authority under S. 1134 should be able to use another authority's administrative procedure to adjudicate a false claim case. The bill specifically authorizes the detailing of Administrative Law Judges from one authority to another for these purposes.

Regarding the implementation of this Act, the Committee expects that the regulations would be substantively uniform throughout the government, except as necessary to meet the specific needs of a particular agency or program.

B. DESIGNATE AGENCY ROLES AND RESPONSIBILITIES

Section 801 of the Program Fraud bill defines the three primary roles in the administrative proceeding—the investigating official, the reviewing official, and the hearing examiner.

The investigating official, who is responsible under section 803(a)(1) for investigating allegations of fraudulent conduct, would be the agency's Inspector General, where statutorily authorized. For the six authorities that do not have statutory IGs, the head of the agency would appoint an investigating official. In the case of the military departments, however, the DoD IG would serve as the central investigatory official. Although the bill provides some flexibility in allowing delegation of the investigating official's responsibilities, S. 1134 does require that the investigating official in all cases must be a grade GS-16 or above if a civilian, and grade 0-7 or above if in the military. The Committee believes that these grade criteria are important, considering the new responsibilities and enhanced authority conferred on the investigating official, to ensure that persons of sufficiently high rank perform this function.

The reviewing official, who would be appointed by the agency head and subject to the same grade criteria as the investiating official, is responsible under section 803(a)(2) for reviewing the investigating official's findings to determine whether there is "adequate evidence to believe" that the person accused of defrauding the government is liable. To ensure independent prosecutorial review, the bill prohibits the reviewing official from (1) being supervised by, or required to report to, the investigating official, and (2) being employed in the investigating official's office. The Committee intends that the reviewing official will provide an objective assessment of the evidence, free from any possible "prosecutorial bias," to screen the meritorious civil fraud cases from those that lack merit. The Committee anticipates that the reviewing official will most likely be an employee of the agency's Office of General Counsel.

If the reviewing official determines there is adequate evidence to believe that the person is liable, the reviewing official would then refer the matter to the Justice Department for review and approval or disapproval. The reviewing official is required under section 803(a)(2) to provide the Attorney General (AG) with certain information on a confidential basis—a description of the claims or statements alleged to be in violation of the Act, evidence supporting the allegations, exculpatory or mitigating information, and an estimation of the money or value of the property requested which is alleged to be false—upon which the AG can better base the decision on where the case should be handled. While S. 1134 does not specifically require the Justice Department to confirm the prosecutorial merit of each and every case, the Committee expects that the AG or his designee will evaluate the material provided by the reviewing official in deciding whether to approve or disapprove referral of the case to the agency for administrative action. It is at this juncture that the government makes an election of its civil remedies; this election and the doctrine of *res judicata* will limit the relitigation or seriatim litigation of the same fraudulent transactions under both this Act and the False Claims Act. The Justice Department is authorized, moreover, to enter into memoranda of understandings with agencies to establish criteria applicable to frequently recurring classes of cases in order to simplify and expedite the referral process.

If the AG approves referral of the case to the agency or, within 90 days, takes no action to disapprove it, the reviewing official is authorized under section 803(d)(1) to notify the person of the allegations of liability and of his or her right to request a hearing. As in the HHS experience under the Civil Monetary Penalty Law, in which the vast majority of cases (76 per cent) are settled without a hearing, the Committee anticipates that many Program Fraud cases similarly will be settled. The reviewing official is also authorized in section 803(i) to compromise or settle any case up until the time a decision is rendered by the hearing examiner.

A hearing would be conducted if, within 30 days of being notified, the person alleged to be liable requests that a hearing be held. A "hearing examiner" would preside over the hearing in order to determine whether the person is liable and, if so, the amount of penalty and assessment to be imposed.

The bill, as introduced, required hearing examiners to be "appointed in the same manner as an administrative law judge" (ALJ), and the sponsors of S. 1134 intended that ALJs would conduct the hearings. However, at the Subcommittee's hearing, Senator Levin raised the concern that the language in S. 1134 did not specifically direct agencies to use ALJs and that, without ALJs, the impartiality of the hearings could not be guaranteed.

To solve this problem, the Committee amended Section 801(a)(4) to state that hearing examiners must be ALJs in those agencies covered by the Administrative Procedure Act. Certain agencies, most notably the Department of Defense, are not covered by the APA and have historically not employed ALJs. For those agencies, the Committee amended S. 1134 to specify that the hearing examiner will have to meet certain criteria, which, taken together, make the hearing examiner for non-APA agencies the functional equivalent of an ALJ. These criteria, adopted virtually *verbatim* from the APA, require that the hearing examiner be (1) recruited, examined, evaluated, and placed on a register by the Office of Personnel Management (OPM), (2) appointed by the agency head from the OPM register, (3) assigned to cases in rotation, (4) prohibited from performing duties inconsistent with the duties and responsibilities as a hearing examiner, (5) entitled to pay prescribed by OPM independent of agency ratings and recommendations, and (6) subject to removal, suspension, or reduction in grade or pay only for good cause after a hearing before the Merit Systems Protection Board.

The Committee believes that it is crucial that the hearing examiner be an ALJ, with all the protections provided by the APA, in order to ensure the fairness of the Program Fraud proceeding. The Committee understands that the OPM currently has a pool of over 280 candidates qualified to serve as ALJs who could fill the new slots created.

C. ESTABLISH DUE PROCESS PROTECTIONS

Hearings under S. 1134 are to be conducted "on the record," in accordance with the due process protections of the Administrative Procedure Act, to determine whether the person accused of wrongdoing is liable and, if so, what penalty and assessment should be imposed. The APA due process protections are provided to ensure that the basic elements of fairness—generally, that the person receive adequate notice and a meaningful opportunity to be heard before an impartial tribunal—are afforded to those alleged to be liable.

While the term "on the record" is commonly understood to trigger the APA due process protections, section 803(f)(1)(A) of the bill specifically requires that agencies covered by the APA shall follow APA procedures in conducting their hearings. For those agencies not covered by the APA, such as the Department of Defense, section 803(f)(1)(B) requires the agency heads to promulgate procedures that incorporate the APA due process protections, spelled out *verbatim* in the bill, for conducting the hearings. These sections are included in S. 1134 to ensure that the APA due process protections are applied in all Program Fraud hearings, whether or not the agency is covered by the APA.

Specifically, the due process protections provided under the bill entitle the person accused of wrongdoing to a notice of the agency hearing (specifying the time, place, nature, legal authority, jurisdiction, and matters of fact and law to be asserted), as well as an opportunity to submit facts, arguments, and offers of settlement. Once at the hearing, the person is entitled to an opportunity to present oral or documentary evidence, to submit rebuttal evidence, and to conduct cross-examination as may be required for a full and true disclosure of the facts. Importantly, the accused has the right, upon application to, and approval by, the hearing examiner, to compel by subpoena testimony or documents from reluctant or hostile sources that may be necessary to the defense. The accused also has the right to be accompanied, represented, and advised by counsel or by certain other representatives as may be designated by agency regulation.

The separation of investigatory and adjudicative functions is ensured by the use of ALJs as hearing examiners and by the prohibition against the investigating official and reviewing official participating in the hearing examiner's or authority head's decision. In the Committee's judgment, these and other safeguards provide sufficient insulation between actors to ensure independent and fair decisions.

In addition, S. 1134 goes beyond the APA and provides the accused with a complaint detailing the allegations (sent by the reviewing official), an expanded notice describing the procedures for conducting the hearing (sent by the hearing examiner), as well as discovery rights to the extent the hearing examiner determines that such discovery is necessary for the expeditious, fair, and reasonable consideration of the issues.

The Committee believes that the discovery rights are important to assure fairness, prevent "trial by surprise," and ultimately improve the quality of the decision. By limiting the use of discovery at the hearing examiner's discretion, the Committee expects that hearing examiners will neither uniformly allow nor routinely deny each request for discovery, but will fairly balance the need and justification, on the one hand, and cost and relevance, on the other. In the ordinary case, the Committee anticipates that the timely exchange of proposed exhibits, witness lists and witness statements wil constitute sufficient discovery. It is clearly the Committee's hope that this alternative administrative mechansim will not become entangled in the unchecked "discovery wars" that render many court cases excessively costly and time-consuming.

The Program Fraud bill was also amended to require that the hearings conducted are to be held either in the judicial district in which the person alleged to be liable resides or transacts business or in the district in which the claim or statement upon which the determination of liability is based was made. Hearings may also be held in any other place agreed to by the person and the hearing examiner presiding over the hearing.

Finally, the accused has the right, within 30 days of the hearing examiner's decision, to appeal to the agency head who may affirm, reverse, reduce, compromise, remand, or settle the case. Within 60 days of the agency head's deicsion, persons determined to be liable have the right, after having exhausted all administrative remedies, to obtain judicial review in the U.S. Court of Appeals for the circuit in which the person resides or in which the claim or statement found to be liable was made.

S. 1134 adopts the standard for judicial review from the APA as the principal check on the quality of the evidence relied upon by the agency in making its decision. Section 805(c) states that the agency's findings, with respect to questions of fact, shall be "final and conclusive and shall not be set aside unless the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if such findings are not supported by substantial evidence."

The "arbitrary and capricious" standard has been interpreted by the Supreme Court to require reviewing courts not only to assure that the decision in question was "based on consideration of relevant factors," but also to determine whether the agency has made a "clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971). In other words, the reviewing court should determine whether the agency had an adequate factual basis for its decision. Similarly, the "substantial evidence" standard has been interpreted by the Supreme Court to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938). In reviewing agency findings under this standard, the court is obliged to consider the "whole record," that is, the court is not supposed to look only for evidence that supports the agency's decision, but is required to consider all the relevant evidence for and against the agency's findings to determine whether they are within the zone of reasonablensss. *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951).

The ABA Public Contract Law Section, which has been a strong advocate for due process protections, testified at the Oversight Subcommittee's hearing that "many procedural deficiencies which plagued earlier versions of the legislation, such as those concerning contractor discovery rights, have been eliminated." Karen Williams, representing the ABA, concludes that "S. 1134 has significantly increased the due process protections provided to defendants over previous program fraud bills."

In sum, before any allegations of wrongdoing even get to a hearing, they must first be considered by the agency's "reviewing official," a person separate from the agency's "investigating official" who originally made the allegations, to determine whether there is adequate evidence to believe that a false claim or statement has been made. If the reviewing official determines there is adequate evidence to proceed, the matter is referred to the Justice Department for further prosecutorial review. An agency may only then go forward with a hearing if the Attorney General approves it or, within 90 days, takes no action to disapprove it. The AG also has the right to block agency action if, for example, he believes that the case lacks prosecutive merit. Once at the hearing stage, the "hearing examiner" presiding is an Administrative Law Judge who, given the procedures for ALJ selection, evaluation, and removal, is independent of the agency. The right to judicial review by the U.S. Court of Appeals serves as the final check.

The Committee strongly believes that the checks and balances inherent in the Program Fraud proceeding will ensure impartial and fair determinations.

D. ESTABLISH LIABILITY AND PENALTIES FOR FALSE CLAIMS AND STATEMENTS

To establish liability under section 802 of the Program Fraud bill, the government must prove, by a preponderance of the evidence, that a person accused of defrauding the government knows or has reason to know that the claim or statement he or she submitted is false. A person found liable under the Act can be subject to penalties and assessments of up to $10,000 for each false claim or statement, plus double the amount falsely claimed.

The "preponderance of the evidence" standard of proof in S. 1134 is, according to the Justice Department, the standard applied in most civil and administrative litigation. The Eighth Circuit recently held in *Federal Crop Insurance Corp. v. Hester,* 765 F 2d 723 (8th Cir. 1985) that "preponderance of the evidence" is the appropriate standard for the False Claims Act, stating: "Because the Act neither requires a showing of fraudulent intent nor is punitive in nature, we find no justification for applying a burden of proof higher than a preponderance of evidence." In testimony on related legislation before the Senate Judiciary Committee on September 17, 1985, Jay Stephens, Associate Deputy Attorney General, stated that "because the False Claims Act is basically a civil, remedial statute, the traditional 'preponderance of the evidence' standard of proof is appropriate." Since S. 1134 authorizes only civil remedies, the Committee agrees with the Justice Department that "preponderance of the evidence" is the proper standard for the Program Fraud proceedings.

The Committee notes, moreover, that this standard is also used for establishing fraud under federal securities laws and recovering treble damages under the antitrust statutes. *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983).

The Program Fraud bill, like the False Claims Act, is intended to reach any fraudulent attempt to cause the government to pay out sums of money or to deliver property or services. This "reach" would not only apply to claims made directly to the Federal government, but also to intermediaries that disburse Federal funds. The Committee notes that many governmental functions are carried out by intermediaries—the Department of Housing and Urban Development insures mortgages which private banks finance; Medicare is administered by private health insurance companies; prime contractors obtain goods and services from subcontractors; and state agencies and community organizations receive Federal funds to achieve Federal purposes. To limit the application of the Program Fraud bill only to claims made directly to the Federal government, as some have recommended, would, in the Committee's judgment, inadequately protect the integrity of all too many federal programs.

In a relevant case, the Supreme Court held in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) that the False Claims Act applied to intermediaries (in this case state governments) as well as to the Federal government. The Court's rationale in *Marcus* was that:

> Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. While at the time of the passage of the original 1863 Act, Federal aid to states consisted primarily of land grants, in subsequent years the state aid program has grown so that in 1941 approximately 10 per cent of all Federal money was distributed in this form. These funds are as much in need of protection from fraudulent claims as any other Federal money, and the statute does not make the extent of their safeguard dependent upon the book-keeping devices used for their distribution.

The Committee believes that the Court's rationale in *Marcus* holds no less for small-dollar false claims under the Program Fraud bill.

False claims, whether made directly to the Federal government or to intermediaries that disburse Federal funds, take many forms, all of which would be subject to liability under S. 1134. Section 802(a)(1) states that a person is liable for submitting a claim that he or she knows or has reason to know is either (A) false, fictitious, or fraudulent, (B) includes or is supported by a false statement, or (C) is for payment for property or services which have not been provided as claimed.

Persons knowingly submitting false statements, unrelated to a claim, would be subject to liability under section 802(a)(2) if the statement either (A) asserts a material fact which is false, fictitious, or fraudulent, or (B) omits a material fact which, as a result of the omission, makes the statement false and which the person making the statement has a duty to include in his or her statement.

The ABA Public Contract Law Section raised some concern at the Oversight Subcommittee's hearing over the inclusion in the bill of false statements unrelated to claims, arguing that false statements do not result in any damage to the United States. While the government may not suffer monetary damage, the Committee believes that false statements adversely affect government programs, in some cases, by allowing persons to participate when they are not eligible.

Derek Vander Schaaf, Deputy Inspector General of the Defense Department, testified at the hearing that the inclusion of false statements is important, especially in the contract fraud area where contractors have been found to falsely certify small business size status, minority business status, allowability of overhead costs, and the accuracy of cost and pricing data. Mr. Vander Schaaf also disagreed with the ABA's contention that the government has no need or grounds for relief since it suffers no damage from false statements:

> The government does suffer damage. The government does not necessarily suffer direct monetary damage. But those false statements certainly affect the integrity of our programs. This includes everything from employment applications to small business certifications to certifications of testing or product performance, all of which can lead us to make bad decisions—for example, hiring the wrong person who's not qualified because he or she submitted a false statement, or awarding a contract to a large business who makes a false certification that it's a small business. While we can't prove monetary damage, we certainly have some damage to our program and the integrity of the whole process.

The ABA correctly pointed out in its testimony that, under present law, there is no civil penalty for submitting a false statement, unrelated to a claim, to the government—only a criminal penalty, which, for many false statement cases, is not being used. The civil False Claims Act does, however, apply to false statements related to claims, such as false representations in bid rigging cases, as well as to false claims that do not result in monetary damage to the government, such as claims that are discovered to be false before they are paid. See *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537 (1943). The Committee, therefore, believes that providing an administrative civil remedy for false statements that are not prosecuted is a logical extension of the False Claims Act.

The Committee does not intend, however, that false statements made in connection with a claim should be twice punished by separate assessments under both sections 802(a)(1) and (2). False statements related to a claim would be covered under section 802(a)(1), while those unrelated to any claim would fall under 802(a)(2).

S. 1134 authorizes hearing examiners to impose penalties of up to $10,000 for each false claim or statement, plus double the amount falsely claimed. The $10,000 penalty is intended to serve as a ceiling; it is expected that the hearing examiner will adjust and determine the assessment based on the circumstances of the case.

Ideally, the Committee believes that penalties imposed under the Program Fraud legislation should be consistent with the forfeitures under the False Claims Act. The $2,000 forfeiture under the False Claims Act, however, has not been increased since the Act was passed in 1863 and is far too low. At least two bills have been introduced to increase the amount of the forfeiture under the False Claims Act to reflect the inflationary impact of the past 120 years. S. 1135, introduced by Senator Cohen on the same day as the Program Fraud bill, would increase the forfeiture to $10,000. Legislation introduced by Senators Grassley, Levin, and DeConcini on August 1, and approved by the Judiciary Subcommittee on Administrative Practice and Procedure on November 7, would make a number of changes in the False Claims Act, including an increase in the forfeiture level to $10,000.

At the Oversight Subcommittee's hearing, the ABA and the AIA witnesses expressed concern over the extent of the penalties and assessments authorized by S. 1134. Part of their concern stemmed from their interpretation that the bill permitted assessments of up to double the amount claimed, rather than double the amount *falsely* claimed. Using their formula, an assessment of $4 million could be imposed in a case of a $2 million claim with a $2,000 false element. The sponsors of S. 1134 always intended, however, that the assessment would be calculated only on the false portion of the claim. In the example above, the assessment could not exceed $4,000 plus the penalty of up to $10,000. The Committee has amended S. 1134 to clarify this potentially costly ambiguity by stating that assessments could not exceed twice the amount of the claim or portion of the claim that is determined to be in violation of this Act.

Similarly, the ABA has raised the question of whether or not an assessment of double the amount falsely claimed could be imposed if the claim has not been paid. In cases where false claims are caught before they are paid, only a penalty of up to $10,000 could be levied. The Committee believes that the conclusion that no double damages be imposed is compelled by the remedial purpose of this legislation and by precendent under the civil False Claims Act.

E. REQUIRE PROOF OF KNOWLEDGE TO ESTABLISH LIABILITY

Under S. 1134, proof that a person has submitted a false claim or statement to the government is not sufficient to establish liability; the government must also prove that the person "knows or has reason to know" that the claim or statement is false.

Witnesses at the Oversight Subcommittee's hearing interpreted this knowledge standard in very different ways. To avoid varying interpretations by the agencies and the courts, the Committee amended the bill to define "knows or has reason to know," for purposes of establishing liability under section 802, to mean that a person:

> Has actual knowledge that the claim or statement is false, fictitious, or fraudulent, or acts in gross negligence of the duty to make such inquiry as would be reasonable

> and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim or statement.

This definition is adopted, in part, from the pattern jury instruction which judges use to instruct lay jury members regarding what the law has traditionally required as a basis for finding knowledge. 2 E. Dewitt & Blackman, *Federal Jury Practice and Instructions*, § 72.06 (3d. Ed. 1977).

The Committee intends, by imposing this *scienter* requirement, to draw the line of liability between "gross" and "mere" negligence; that is, a person's gross neglect of facts which are known or readily discoverable upon reasonable inquiry should result in liability, while errors resulting from mere negligence, mistake, momentary thoughtlessness, or inadvertence should not. Considering the complexity of government regulations and eligibility standards, the Committee is cognizant of the opportunities for confusion and error and believes that mere negligence should not be penalized. The definition of "knows or has reason to know" adopted by the Committee clarifies that a person who makes a false claim or statement through mere negligence does not meet the requisite *scienter* requirement and would not, therefore, be liable under the Act.

Only those individuals who are extremely careless, who demonstrate an extreme departure from ordinary care, would be subject to liability for submitting a false claim or statement to the government. The "gross negligence" standard is intended to reach a person who disregards a high degree of risk, either known to him or apparent to a reasonable person in his position.

This knowledge standard is consistent with the Eighth Circuit's decision in *United States v. Cooperative Grain and Supply Co.*, 476 F. 2d 47, 60 (8th Cir. 1973), in which the court held that the "extreme carelessness" of the defendants fully supported a finding of liability under the civil False Claims Act. The court noted that:

> The individual producers here are a full step beyond negligent misrepresentation as they were extremely careless in substituting purchased grain for what was represented to be grain produced by them.

Similarly, the Court of Claims, in *Miller v. United States,* 550 F. 2d 17, 23 (Ct. Cl. 1977), recognized the duty of those seeking to obtain government funds to make correct representations. The court held in *Miller* that overbilling as the result of the failure to maintain adequate controls constituted extreme negligence for which the contractor was liable under the False Claims Act.

In *United States v. Klein,* Civ. No. 1035-51, (D.N.J. Feb. 2, 1953), moreover, the court found the defendant liable under the False Claims Act for having supplied substandard milk to the government:

> At no time did [the defendant] take upon himself to make any investigation as to whether the milk that he was receiving was of the quality which he solemnly promised the United States Government under his contract it would receive. If he did not know that what he was delivering was not the kind of milk that was in the contract, it was the *grossest kind of carelessness and negligence* upon

> his part, for which he must assume the responsibility of knowledge. (Emphasis added)

The Courts have adopted similar standards in other contexts in which the public interest is implicated. In *Norton v. Curtiss,* 433 F. 2d 779 (C.C.P.A. 1970), a private party urged that a patent application be stricken because it was allegedly tainted by fraud. Recognizing the duty of patent applicants to provide complete and accurate information and the strong public interest in the integrity of the patent system, the Court of Customs and Patent Appeals held that "[w]here public policy demands a complete and accurate disclosure it may suffice to show that the misrepresentations were made in an atmosphere of gross negligence as to their truth." 433 F. 2d at 796.

The Committee, therefore, believes, as does the Department of Justice, that the gross negligence standard is well-grounded in case law as a basis for liability under the False Claims Act as well as other statutes.

The affirmative duty, as required under the definition, to "make such inquiry as would be reasonable and prudent to conduct under the circumstances" is premised on the Committee's belief that a person seeking government business or benefits has an inherent obligation to "advise the government of the true and accurate factual basis of [his or her] claim." *United States v. Cooperative Grain and Supply Co.,* Supra. 476 F. 2d at 55.

Within the scope of this responsibility, the court found in *Cooperative Grain* that "the applicant for public funds has a duty to . . . be informed of the basic requirements of eligibility." The court further stated that "a citizen cannot digest all the maniford regulations, nor can the government adequately and individually inform each citizen about every regulation, but there is a corresponding duty to inform and be informed."

The knowledge standard also reaches those persons who, as Ms Kusserow testified, "play ostrich" and attempt to avoid knowledge of wrongdoing through self-imposed ignorance. In his testimony before the Oversight Subcommittee, Mr. Kusserow stated: "This standard is essential to reach conduct by individuals who would avoid finding out what the applicable rules and standards are, and then seek to hide behind their ignorance." The Committee agrees that such persons who turn a blind eye to fraudulent conduct—in some cases, by isolating or insulating themselves from wrongdoing—should not escape liability.

Given the wide range of programs to which S. 1134 applies, the Committee intends that the "duty to make inquiry" language should be interpreted to allow for the consideration of factors such as the clarity of the applicable regulations, the relative sophistication and resources of the citizen, the burdensomeness or ease of the inquiry, the amount of time available, and the costs involved. A low-income individual applying for a student loan, for example, may be held to a different obligation than an established government contractor that certifies its cost submissions as accurate, complete, and current. This standard, therefore, allows determinations of liability to be tailored to the program, with persons judged according to the general conduct of others participating in the same program.

The duty language also guards against the government charging that everyone in a corporation, for example, had reason to know that a representation made or prepared by one low-level employee was false. The language would limit personal liability for the submission of a false claim to those individuals who—based on their job responsibilities and their substantive role in advancing the claim—knew or had reason to know that the claim was false. While this does not mean that the corporate vice president, responsible for certifying the truth and accuracy of the company's claims, has to redo the work of his or here subordinates, the executive could be found liable for failing to take any steps whatsoever to ensure the truth and accuracy of the claims.

The Committee would also point out that, while the personal liability of the individual corporate officials would be limited to their role in preparing representations or submitting claims, the corporation would be held responsible for the collective knowledge of its employees under the doctrine of *respondeat superior.*

On a separate but related issue, the Committee emphasizes that the knowledge standard in the Program Fraud bill does not require proof of "specific intent," an element of proof that, if required, would greatly complicate and impede the government's efforts to recover loss attributable to false claims.

In support of its decision not to adopt a "specific intent" standard, the Committee cites the prevailing view adopted by five circuits, as well as the Court of Claims, that the civil False Claims Act only requires that the defendant knowingly present a false claim to the government. *United States v. Hughes,* 585 F. 2d 284, 287 (7th Cir. 1978); *United States v. Cooperative Grain and Supply Co.,* 476 F. 2d 47, 57 (8th Cir. 1973); *Miller v. United States,* 550 F. 2d 17, 23 (Ct.Cl. 1977); *Flemming v. United States,* 336 F. 2d 475, 479 (10th Cir. 1964); *United States v. Toepleman,* , 141 F. Supp. 677, 683 (E.D. N.C. 1956), *aff'd in part and rev'd in part on other grounds sub nom. United States v. McNinch,* 242 F. 2d 359 (4th Cir. 1957), *rev'd on other grounds,* 356 U.S. 595 (1958); *United States v. Foster-Wheeler,* 316 F. Supp. 963, 967 (S.D. N.Y. 1970), *modified in part on other grounds,* 447 F. 2d 100 (2d Cir. 1971) and *Alsco-Howard Fraud Litigation,* 523 F. Supp. 790, 806 (D.D.C. 1981).

The Committee does not believe that the administrative proceeding provided in the Program Fraud legislation should be saddled with higher proof requirements than under the civil False Claims Act.

Finally, the Committee does not believe that persons should be penalized under the Act for good faith disputes with the government. In a letter to the Committee last year, the ABA Public Contract Law Section raised concerns that "virtually any noncompliance with contract terms and/or specifications would be defined as actionable fraud." With the modifications made to S. 1134, however, Ms. Williams testified before the Oversight Subcommittee this year that the bill "properly excludes mistaken or genuinely disputed claims from the coverage of the legislation." Mr. Williard also testified that the Justice Department is "unaware of any case in the 120-year history of the False Claims Act in which a contractor has been punished for a honest dispute with the government." The Committee expects the same unblemished track record under the Program Fraud bill.

F. CLARIFY LINKAGE BETWEEN PROGRAM FRAUD LIABAILITY AND OTHER ADMINISTRATIVE OR CONTRACTUAL ACTION

Under section 802(b) of S. 1134, either a determination that there is adequate evidence to believe that a person is liable or a finding that, in fact, the person is liable *may* be grounds for commencing any administrative or contractual action against such person but *shall not* require the agency to take such action. This language was included in the bill, as introduced, to address the concern raised by both the ABA Public Contract Law Section and some defense contractors that a Program Fraud finding of liability would automatically trigger—that is, be the sole determinant of—a suspension or debarment. (The imposition of a suspension or debarment prohibits a contractor from doing business with the Federal government for a period of time.)

A suspension or debarment proceeding, while also administrative, is separate and distinct from the Program Fraud proceeding. Agencies impose suspensions or debarments to protect the government's interest, not for the purpose of punishment. In a suspension or debarment proceeding, the contractor's responsibility, mitigating factors, and the seriousness of the offense are all considered by the debarring official. As the Federal Acquisition Regulations on debarment state, the existence of a cause for debarment does not necessarily *require* that the contractor be debarred.

Additional language was adopted by the Committee to ensure that factors other than a Program Fraud finding of liability would be considered in a suspension or debarment proceeding. Section 802(b)(3), recommended by the ABA Public Contract Law Section, states that a Program Fraud determination shall not be considered as a "conclusive determination" of a person's "responsibility" for suspension or debarment purposes. Other factors, such as any disciplinary or corrective measures undertaken or the person's reputation and past performance record, would also be relevant to a suspension or debarment.

The Committee does not intend, however, that a Program Fraud finding of liability and the facts supporting such finding should have to be relitigated in a suspension or debarment proceeding. Considering the due process protections, as well as the opportunity for judicial review, provided in S. 1134, the Committee agrees with the Justice Department's testimony before the Oversight Subcommittee that:

> There is no justification for disturbing the normal rules of *res judicata* and collateral estoppel and requiring another tribunal to go through the costly exercise of retrying the same facts that have already been established under the same standard of proof in a civil penalty proceeding.

Separate concerns were raised by defense industry officials that the Program Fraud proceeding would supersede the present contract dispute process. The Committee intends, however, that contract disputes under the Contract Disputes Act and fraud allegations under the Program Fraud Act would be considered in wholly separate and independent proceedings. To ensure that, S. 1134 was modified from previous program fraud bills prior to introduction to exclude legitimate contract disputes from coverage under the bill. The Contracts Dispute Act, moreover, specifically exempts allegations of fraud from the jurisdiction of the Boards of Contract Appeals.

Defense industry officials also expressed concern that S. 1134 could be used to intimidate contractors from filing contract appeals because of the threat of punitive fraud proceedings. The Committee notes that the contracting officer, who is involved in the contracts dispute process, would not be the official deciding whether or not to initiate a Program Fraud proceeding, thereby removing the opportunity to misuse the bill from the person presumably most tempted to do so.

The Committee is aware that some overlap in the civil remedies available to the government exists. For example, conduct which could be the subject of a program fraud proceeding could also be covered by other laws, such as the Civil Monetary Penalties Act or the Truth in Negotiations Act. The Committee intends, however, that the government *collect* monetary relief under only one statute.

Finally, the Committee wishes to clarify the relationship between a Program Fraud proceeding involving a Federal employee and the disciplinary proceedings authorized by the Civil Service Reform Act of 1978. A determination that there is adequate evidence to believe that a Federal employee is liable or a finding of liability under the Program Fraud Act could be grounds for commencing a subsequent disciplinary action against the Federal worker. As with suspensions and debarments, an agency, at its discretion, could undertake an administrative action against the employee but would not be required to do so. The disciplinary proceedings would, however, be separate and distinct from the Program Fraud proceedings, and the employee's rights provided under the civil service law would remain unchanged by S. 1134.

G. ESTABLISH $100,000 JURISDICTIONAL CAP

Section 803(c) establishes a $100,000 jurisdictional cap on false claims that can be adjudicated administratively under the Act, thus preserving the Committee's intent that S. 1134 serve as a "mini False Claims Act" for small-dollar cases declined for prosecution. While the cap does not preclude the Justice Department from asserting jurisdiction over cases under the threshold, it does preclude the administrative adjudication of cases involving a claim or group of claims submitted together where the loss or false amount exceeds $100,000, which the Committee believes should be prosecuted in court.

Concerns were raised, primarily by the ABA Public Contract Law Section, that an agency could separate a group of related false claims into individual actions so as to come under the jurisdictional limitation. The Committee does not believe that a group of related false claims submitted together, possibly resulting in penalties of hundreds of thousands or even millions of dollars, should be adjudicated administratively. If these related claims, in the aggregate, exceed $100,000, they should be prosecuted together in court under the False Claims Act, not separately in an administrative proceeding under the Program Fraud bill.

One safeguard against the potential abuse of an agency splitting claims in order to circumvent the judicial process is the Justice Department's review and approval role in Program Fraud proceedings. Senator Cohen, the chairman of the Oversight Subcommittee, wrote to the Department of Justice on July 31, 1985, concerning the application of the $100,000 cap. In an August 23 response to Senator Cohen, the Deputy Attorney General, Lowell Jensen, expressed strong support for the strict application of the jurisdictional cap. Mr. Jensen pointed out that allowing agencies to treat related claims individually (as recommended by the Inspectors General) would vitiate the entire concept of a ceiling. Given the Justice Department's position on the jurisdictional cap, the Committee is confident that the Department will carefully review all cases submitted by individual agencies to ensure that the jurisdictional threshold is not circumvented.

Moreover, the Committee adopted a direct safeguard against this potential abuse by amending section 803(c) to require that the $100,000 cap be applied to the aggregate of any false claim or group of related false claims submitted at the same time. The imposition of penalties and assessments, however, would apply to each claim within the group, as long as the aggregate amount of the claims does not exceed $100,000. Related claims which are not submitted together, such as a series of claims for progress payments under the same contract, would be considered separately for both jurisdictional cap and penalty purposes.

In determining whether or not the $100,000 cap is exceeded, the amount claimed in violation of the Act, is controlling, e.g., the amount falsely claimed for work not performed or the amount by which the claim was fraudulently inflated. In some instances, of course, where the misrepresentation affects the claimant's basic eligibility to receive transfer payments from a program, the entire amount of the payments would be obtained in violation of the Act and that amount would govern the applicability of the ceiling. In general, however, the ceiling is based on an assessment comparable to the traditional concept of damage and is calculated according to the amount that is alleged to have been sought in violation of the Act. The "additurs" (the possible assessment of up to $10,000 as a civil penalty and up to twice that amount falsely claimed) are excluded from the calculation of the ceiling.

The Committee also considered whether or not $100,000 was the appropriate amount for the jurisdictional threshold. The President's Council on Integrity and Efficiency, representing the Inspectors General, urged the Committee to remove the cap altogether. The The Inspectors General argued that the cap creates a privileged class of cases over $100,000, which, if declined for prosecution by the Justice Department, would fall through the cracks of the judicial system. While sympathetic to the concerns of the Inspectors General, the Committee rejected their recommendation for three reasons.

First, and most important, the Committee believes that large-dollar fraud cases, which can result in the imposition of multi-million dollar penalties, should be tried in federal court. Second, although currently the Department of Justice generally accepts cases exceeding $100,000 for prosecution, removal of the ceiling could create an incentive for the Justice Department to decline large-dollar cases that should be vigorously pursued in court. Third, the Department of Justice maintains that any case ivolving more than $100,000 declined by the Department would be one with such substantial shortcomings as to make an administrative civil penalty proceeding problematic.

In contrast to the Inspectors General, some industry representatives have recommended that the jurisdictional cap be lowered to either $50,000 or to $25,000. The Committee rejects this proposal as defeating the entire purpose of this legislation. Cases involving amounts between $25,000 and $100,000 are precisely the ones that the Department of Justice is declining to prosecute simply because of the relatively small amount of money involved. The costs of litigating these cases usually exceed the potential recoveries.

The Committee agrees with the Department of Justice that the $100,000 ceiling is a reasonable threshold. As the Department stated in its August 23 letter to Senator Cohen, "the $100,000 ceiling achieves the balance so essential in this delicate area of public policy."

When S. 1134 is enacted, the Committee will closely monitor its implementation to determine whether the jurisdictional cap should be adjusted in light of the experience under the Act.

H. PROVIDE LIMITED SUBPOENA AUTHORITY

Section 804 of the Program Fraud bill provides both the investigation official and the hearing examiner with subpoena authority. The investigating official is authorized, for purposes of conducting an investigation, to administer oaths or affirmations, to require by subpoena the production of all documents, reports, records, and other information not otherwise reasonably available, and to require by subpoena the attendance and testimony of witnesses if it is necessary to conduct the investigation. For purposes of conducting a hearing, the hearing examiner is similarly authorized to administer oaths or affirmations, as well as to subpoena both documents and witnesses.

Much of the debate over this grant of authority has focused on the investigatory testimonial subpoena power. A frequent argument raised by opponents is that the Inspectors General should not have investigatory testimonial subpoena authority since the Federal Bureau of Investigation (FBI), the Federal government's principal criminal investigative agency, does not have it. The Committee points out that, in criminal investigations, which is the FBI's primary mandate, the grand jury process is frequently used to compel testimony. When the Inspector General conduct criminal investigations, they too work with United States Attorney offices and with grand juries in order to obtain the necessary testimony. In civil cases, the Justice Department has for several years, including this year, requested the authority to compel testimony in the investigation of civil fraud cases through the use of civil investigative demands (CID), virtually the equivalent of a testimonial subpoena. (The Antitrust Division of the Department of Justice already has CID authority for its antitrust investigations.) The Committee believes that the Justice Department's need for CID authority in pursuing its civil fraud cases under the False Claims Act is parallelled by the need of Inspectors General for testimonial subpoena power in proving their cases under the Program Fraud bill.

The Inspectors General point out that this subpoena authority will be an effective tool in helping the government prove the elements required to establish liability under the bill. Proof of knowledge in fraud cases is particularly difficult. Except in the rare case where the government has a direct confession from the defendant, knowledge must be proved indirectly. Proof of facts and circumstances surrounding the events in question must be accumulated to the degree of allowing the finder of fact, in this case the "hearing examiner," to infer that the defendant either knew or had reason to know of the falsity of the representations.

Documentary evidence often is not enough. Rather, proof of knowledge is established, at least in part, by conversations that the defendant had with government agents, employees, former employees, business associates, friends, or others. In the absence of testimonial evidence, proof of knowledge and, ultimately fraud, is quite difficult to establish. Few who defraud the United States leave a sufficient "paper trail" to enable proof of fraud by documents alone. The Committee, therefore, believes that investigatory testimonial subpoena authority is needed to help combat fraud against the government.

The Committee emphasizes that there is ample precedent for granting investigatory testimonial subpoena authority to Executive departments and regulatory agencies. The American Law Division of the Congressional Research Service compiled a list of more than 65 statutes that provide such authority, ranging from the broad power granted to the Department of Health and Human Services for investigations of claims for Social Security retirement and disability benefits to the authority given to the Department of Agriculture for investigations under the Horse Protection Act.

One pertinent example is the authority granted to the Secretary of the Department of Housing and Urban Development (HUD) under the Interstate Land Sales Act to compel the attendence and testimony of witnesses for the purpose of conducting investigations into fraud or misrepresentation by land developers. The Secretary has delegated this authority to the HUD Office of Interstate Land Sales Registration which, according to a November 13 letter from Stephen May, an Assistant Secretary of HUD, has found it to be "a very effective investigative" tool. Mr. May stated further that this "subpoena authority . . ., by itself, sometimes is enough to facilitate investigations. Investigated parties or potential witnesses often comply voluntarily with requests for information simply because they know that a subpoena can be issued if necessary." Since 1979, the Office has issued 264 testimonial subpoenas under the Land Sales Act.

Testimonial subpoenas are also widely used by regulatory agencies, such as the Federal Trade Commission (FTC), the Securities and Exchange Commission, and the Commodity Futures Trading Commission. The FTC, which combats fraud in the consumer marketplace, has had testimonial subpoena authority for use in its investigations since 1914.

Despite the need for this authority and the precedent for its use, concerns were nonetheless raised at the Oversight Subcommittee's hearing that investigatory testimonial subpoena authority could be abused, particularly in the hands of an over-zealous investigating official. Mr. Willard expressed Justice Department opposition to granting this new authority because it could "interfere with the criminal investigation process" and "potentially adversely affect coordinated law enforcement." Defense industry representatives also opposed what they considered to be "unfettered" authority on the grounds that it would "permit fishing expeditions for information that can then be used in any number of different contexts." The potential for abuse was greatest, according to the defense contractors, in the case where a relatively low-level official is appointed to serve as investigating official in a department, such as the Treasury Department, which does not have a statutory Inspector General.

In response to these concerns, the Committee adopted amendments to circumscribe the testimonial subpoena authority to safeguard against abuse. First, the Justice Department is given veto authority over its use. Section 804(a)(2) requires that the investigating official, prior to issuing a subpoena, first notify the Attorney General (AG), and permits the AG or Assistant AG, within 45 days of being notified, to disapprove the subpoena. The Committee believes that giving the Justice Department a veto over testimonial subpoenas answers the concern raised by Mr. Willard about the potential interference with the Department's criminal investigations. Second, the authority to issue testimonial subpoenas is limited to the statutory IGs. Section 804(3)(A) specifically prohibits any delegation of this authority.

Together, these amendments ensure that investigatory testimonial subpoena authority will be used only by the 18 statutory IGs when it is necessary to conduct the investigation and only when the Justice Department does not disapprove its use.

In the case of a refusal by the person subpoenaed to obey the subpoena, the sole remedy provided by S. 1134 is enforcement of the subpoena in United States District Court. However, the investigating official would not have independent authority to invoke the aid of the District Court. Rather, in conformance with usual government practice, the investigating official would have to seek assistance from the Department of Justice in order to obtain a court order for compliance with the subpoena. The person subpoenaed is only liable for contempt if that person fails to obey the subsequent order of the District Court. In effect, then, the Justice Department has two opportunities to review the propriety of a testimonial subpoena, and a District Court has the opportunity to refuse enforcement of the subpoena, thus providing additional protection against potential abuse.

In addition to these safeguards, the Committee also adopted several amendments to provide due process protections for individuals who are subpoenaed by the Inspectors General. As reported, S.

1134 affords persons subject to testimonial subpoenas a notice of the date, time, and place at which the testimony will be taken; the right to be accompanied, represented, and advised by an attorney; an opportunity to examine and to make changes in the transcript, and payment of the same fees and mileage as are paid witnesses in U.S. district courts.

The amendment bill also specifies that the testimony is to be taken in the judicial district in which the subpoenaed person resides or transacts business, or in any other place agreed to by the person and the investigating official taking the testimony. To protect the confidentiality of the testimony, the bill stipulates that only the person giving the testimony, his or her attorney, the investigating official, and a stenographer can be present. Other individuals may be present only if the person subpoenaed and the investigating official both agree to their presence.

The Committee notes that these provisions provide considerably more protection to individuals subpoenaed in Program Fraud investigation than under other statutes authorizing testimonial subpoenas. Under the Interstate Land Sales Act, for example, a person can be subpoenaed to testify anywhere in the United States, and there is no *statutory* provision guaranteeing the right of the person to be represented by counsel while giving testimony. Moreover, under many of the laws authorizing investigative testimonial subpoenas, the authority is given to the Secretary of the department who may delegate this power. This delegation authority stands in sharp contrast with the provisions of S. 1134 which limit the authority to issue testimonial subpoenas to the Inspectors General only.

Some critics, nonetheless, maintain that testimonial subpoena authority, even with these safeguards, is still not needed and point to the HHS experience under the Civil Monetary Penalty Law in which the IG has successfully developed cases without the benefit of this authority. In testimony before the Oversight Subcommittee, however, Mr. Kusserow stated that his office was "hampered in some of its efforts without testimonial subpoena authority." In a September 30, 1985, letter to Senator Cohen, Mr. Kusserow added that: "Although our successful collection efforts under CMPL suggest that administrative penalties and assessments can be an effective remedy, we currently must forego recovery in too many cases due to out inability to obtain the necessary testimonial evidence to prove a violation of the statute." Mr. Kusserow points out that, in some cases, persons accused of defrauding the government attempt to transfer liability to other parties, such as administrators, billing clerks, field personnel, or business associates, which makes it particularly difficult to meet the government's burden of proof with respect to knowledge. In his letter, Mr. Kusserow provides examples, based on actual CMPL cases, that illustrate this problem and the kinds of situations where investigatory testimonial subpoena authority would have proved helpful:

A large home health agency was engaged in a pattern of patent fraud. The agency was billing Medicare for services not provided and for services which were not eligible for reimbursement. Books were doctored to make it appear as if legitimate services had been rendered. Improper payments to the agency amounted to several hundred thousand dollars, and the owners had removed substantial profits from the agency in years past. Unfortunately, our evidence of the improper practices, as recounted by employees and former employees, implicated only the *administrator* of the home health agency in the unlawful acts. The administrator, who was on salary, had no apparent motive to cheat the Medicare program. It was logical to shift our investigative focus to the owners of the agency, but without the testimony of the administrator, we have little evidence of the involvement of the owners in the conduct of the business. The administrator has adamantly refused to talk to us about the owners. Without the authority to require her testimony, we have no way to determine whether the owners are liable under CMPL for the improper activities.

For four years, two physicians billed Medicare inappropriately high codes for visits to hospitalized patients, with damages to the program near $100,000. For example, the physicians utilized a code signifying intensive care unit services when the patients were not in such a unit. During the investigation, the physicians produced an affidavit from their billing clerk of long standing, wherein she stated she relied on outdated code numbers by error, and that she *never* discussed the level of billing or code numbers with the physicians. Even though her affidavit raises certain questions, the billing clerk is reluctant to discuss the case with our investigators.

A lower level computer operator at a hospital noticed that the hospital computer program was billing Medicare twice for the same sets of tests. He told his supervisor and the problem was corrected. However, two days later, someone changed the program back to billing twice for the lab tests. Employees of the hospitals would not submit to interviews, and we were unable to determine who made the change, who ordered the change, and who knew about the change.

I. PROVIDE SETOFF AUTHORITY

S. 1134, as introduced, did not provide agencies with setoff authority, which would authorize an agency to deduct the amount of any sum owed by a person under a Progrm Fraud proceeding from amounts otherwise owed to that person from the United States. This provision, which had been in earlier Program Fraud bills, was added by the Committee in light of the unanimous support from government witnesses. Mr. Willard stated at the Oversight Subcommittee's hearing that "the collection of money owed is often as difficult as winning a judgment itself," and recommended that setoff authority be provided to facilitate this collection process. The authority in S. 1134 excludes, however, the use of tax refunds for setoff purposes.

VI. CERTAIN CONSTITUTIONAL CONSIDERATIONS

The concept of an administrative sanction for imposing civil money penalties, while widely supported by the Justice Department, the Inspectors General, the General Accounting Office, the Administrative Conference of the United States, and the Federal Bar Association, among others, has not gone without constitutional challenge.

Seventh Amendment challenges were rejected by the Supreme Court in the leading case of *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission,* 430 U.S. 442 (1977). The Court noted that:

> Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred.

The dispute in *Atlas Roofing* focused on whether the administrative imposition of civil money penalties under the Occupational Safety and Health Act of 1970 violated the Seventh Amendment, which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trail by jury shall be preserved. . . ."

Under OSHA, the Federal government is authorized to (1) obtain abatement orders requiring employers to correct unsafe working conditions, and (2) impose civil penalties on any employer maintaining any unsafe working conditions. If an employer contests an abatement order or penalty, an evidentiary hearing is held before an Administrative Law Judge of the Occupational Safety and Health Review Commission who may affirm, modify, or vacate the proposed abatement order and penalty. The judge's decision may be appealed to the full Commission. Commission rulings may then be subject to judicial review by the U.S. Circuit Court of Appeals for the circuit in which the case arose, but the Commission's findings of fact, if supported by substantial evidence, are conclusive.

In rejecting the constitutional challenge against OSHA's enforcement procedures, the Court held:

> We cannot conclude that the [Seventh] Amendment rendered Congress powerless—when it concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to regulate—to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law—such as an administrative agency—in which facts are not found by juries.

The Court further stated that:

> Congress is not required by the Seventh amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field.

In support of its decision, the Court cited several cases which also have upheld the constitutionality of administrative civil money penalties. In *Lyoyd Sabaudo Societa* v. *Elting,* 287 U.S. 329,335 (1932), for example, the Court recognized the principle that "due process of law does not require that the courts, rather than administrative officers, be charged . . . with determining the facts upon which the imposition of [fines] depends." In *Oceanic Nav. Co* v. *Stranahan,* 214 U.S. 320 (1909), moreover, the Court concluded that ". . . it [is] within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable monetary penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power."

Similarly, in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court again addressed the Seventh Amendment issue raised when Congress commits the factfinding function under a new statute to an administrative tribunal. Under the National Labor Relations Act, Congress has charged the National Labor Relations Board with the task of determining whether an unfair labor practice had been committed and ordering backpay where appropriate. The Court held in *Jones & Laughlin* that:

> The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements [administratively] imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit.

Finally, in *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974), the Court reaffirmed its finding in *Block* v. *Hirsch*, 256 U.S. 135 (1921), in which the Court sustanied Congress' power to pass a statute, applicable to the District of Columbia, temporarily suspending landlords' legal remedy of ejectment and relegating them to an administrative factfinding forum. The Court subsequently held in *Pernell* that:

> *Block* v. *Hirsch* merely stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication. . . .

The Committee believes that these Supreme Court rulings clearly demonstrate that Congress may constitutionally assign the enforcement of certain statutes to a tribunal other than a court of law, such as as administrative agency. *Atlas Roofing*, 430 U.S. at 455. At the Oversight Subcommittee's hearing, the Justice Department cited the *Atlas Roofing* decision as evidence of the Program Fraud bill's constitutionality and testified that the proceedings authorized by S. 1134 would not violate the Seventh Amendment.

Secondly, the Committee believes that S. 1134 meets all serious due process objections that might be raised.

The Supreme Court has, in fact, upheld laws that provide far less elaborate due process protections than are afforded by S. 1134. The Court found, for example, that there is nothing *per se* unfair or contrary to due process about an agency adjudicator participating in the investigation of the case which he subsequently must decide. In *Withrow* v. *Larkin*, 421 U.S. (1975), a state medical board was responsible both for the investigation of charges that a doctor was guilty of unprofessional conduct and for the determination of discipline, if any, to imposed. The Supreme Court upheld the board's action, concluding that bias is not inherent in the combination of roles, and that without specific evidence of bias or prejudice, no violation of due process existed.

Similarly, in *FTC v. Cement Institute,* 333 U.S. 683 (1948), the Supreme Court rejected a claim that FTC commissioners who had expressed in public their view that the Institute's pricing practices were illegal must disqualify themselves from adjudicating the case.

In addition, the Supreme Court has repeatedly rejected the notion that administrative hearings must adhere to the judicial model of due process. In *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886,894 (1961), the Court stated that "[t]he Fifth Amendment does not require a trail-type hearing in every conceivable case of government impairment of private interest." The Court reaffirmed this principle in *Mathews v. Eldridge,* 414 U.S. 319,348 (1976), where it stated that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances."

The requirements of due process are dictated by the demands of the particular situation. *Morrissey v. Brewer* 408 U.S. 471, 481 (1972). The Supreme Court fashioned guidelines in *Mathews v. Eldridge,* 424 U.S. at 335, which require consideration of three distinct factors: the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional substitute procedural safeguards; and the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Thus, the Committee believes that S. 1134 grants more than the minimum due process which the Supreme Court has required. While the Court appears to have approved situations in which the role of investigator and adjudicator is either blurred or overlaps, the bill cleanly separates these roles, requiring insulation and prohibiting *ex parte* communications or "command influence" which might subvert the process. Furthermore, S. 1134 prescribes hearing procedures, described earlier in this report, which exceed the minimum standard which the Supreme Court has upheld.

In addition to Seventh Amendment and due process claims, the constitutionality of administrative civil penalty statutes has also been disputed on the basis that such statutes, because they impose penalties, should be characterized as "penal," rather than "remedial." This distinction is important because persons alleged to be liable (guilty) would, under a "penal" or criminal statute, be afforded the constitutional right to a jury trial.

The Supreme Court rebuffed this constitutional challenge in *Helverling v. Mitchell,* 303 U.S. 391 (1938), holding that remedial sanctions may be of varying types:

> One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted. Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceedings since the original revenue law of 1789. . . . In

> spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions.

In the case of an administrative remedy for false claims, as is provided by S. 1134, the Justice Department cited *United States ex rel. Marcus v. Hess,* 317 U.S. 537 (1943), in its testimony as the basis for defending the Program Fraud bill's remedial, and therefore constitutional, status. The Supreme Court held in *Marcus* that the civil False Claims Act, which provides double damages and a $2,000 forfeiture for each false claim, is a "remedial statute imposing a civil sanction."

The primary purpose of the civil False Claims Act, according the Court's decision, is "to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." The Court dismissed the argument that the False Claims Act may be considered criminal because it imposes penalties in excess of actual damages, stating "this remedy does not lose the quality of a civil action because more than the precise amount of so-called damage is recovered." Costs other than damages are sustained in detecting, investigating and adjudicating false claims.

Since the Program Fraud bill is based on the civil False Claims Act—serving as the administrative alternative for small-dollar false claims—the Committee believes, concurring with the Justice Department, that S. 1134 is by extension also a "remedial statute imposing a civil sanction" and, therefore, withstands constitutional challenge.

VII. Conclusion

The enactment of an administrative remedy to small-dollar fraud cases is long overdue. The fact that the Justice Department declines prosecution in most cases where the government does not sustain a significant monetary loss is an open invitation to those individuals tempted to defraud the Federal government. Until Federal agencies are given the power to bring administrative proceedings in such cases, "nickle and dime" frauds against the government will continue unabated.

S. 1134 has been endorsed by the General Accounting Office, the Department of Justice, and the Inspectors General, the major players in the fight against fraud. The Committee believes that its enactment will add a powerful new weapon to the government's fraud-fighting arsenal. At the same time, in drafting the bill, the Committee was always mindful of the need to protect the rights of those accused of wrongdoing. The Committee believes that the Program Fraud Civil Remedies Act will help combat fraud without in any way compromising the rights of individuals accused of wrongdoing.

VIII. LETTERS OF SUPPORT

The Committee received the following letters of support for S. 1134 from the General Accounting Office, the Department of Justice, the Inspectors General, the Federal Bar Association, the Administrative Conference of the United States, and the Federal Administrative Law Judges Conference:

COMPTROLLER GENERAL OF THE UNITED STATES
Washington DC, October 21, 1985.

B-204345.
Hon. WILLIAM S. COHEN,
Chairman, Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, U.S. Senate.

DEAR MR. CHAIRMAN: This is to express our continued support for the enactment of legislation to authorize federal agencies to levy administrative penalties for certain false claims and statements made to the United States. We firmly believe such legislation would further strengthen the government's overall ability to combat fraud, waste and abuse within government programs.

As you know, we have testified in support of bills similar to S. 1134, the Program Fraud Civil Penalties Act of 1985, before the Senate Governmental Affairs Committee on two previous occasions. In 1982 we expressed our support of S. 1780, and in 1983 we supported the enactment of S. 1566. Our position stems from a 1981 report entitled "Fraud in Government Programs:—How Extensive Is It—How Can It Be Controlled?" (AFMD-81-57; May 7, 1981), in which we recommended that the Congress consider enacting legislation giving agencies the authority to administratively impose civil money penalties against persons who defraud the government. Our study showed that the Department of Justice declined to prosecute about 61 percent (7,800) of 12,900 fraud cases referred for prosecution. In many of those cases Justice declined to prosecute on the grounds that the cases involved small dollar amounts, had no prosecutive merit, or jury appeal. We believed, and continued to believe, that the establishment of an administrative penalty system could provide the government with a viable alternative remedy in such cases. Such a system would not only strengthen the government's ability to recover misappropriated funds, but also serve as a deterrent against others committing similar offenses.

We are pleased to see that the bill under consideration by the Congress—S. 1134—has received strong support from the Justice Department and the Inspector General community. In Justice's testimony before your subcommittee this past June, it recognized that the administrative resolution of fraud cases involving small amounts of money would offer the government an efficient and effective alternative to litigating such cases in federal courts, usually a lengthy and costly process. Representatives from the Inspector General community also provided numerous examples during their testimony of where S. 1134 would be most appropriately used. The Deputy Inspector General of the Department of Defense (DOD) cited a case in which a contractor operated a parts store on 10 different military bases. He illegally inflated parts prices on each contract. While the total fraud amounted to over $50,000, no single base was defrauded for more than $6,000. Each case was presented to nine separate United States Attorneys, and was declined at each office because the dollar value was too low. Seeking an administrative penalty such as provided for in S. 1134 would be a viable alternative remedy in such a case.

Your subcommittee has made several notable changes to the proposed legislation since our 1983 testimony on S. 1566, the predecessor of S. 1134, such as: (1) modifying the standard of liability to authorize the imposition of penalties when a person submits claims or statements that he knows *or has reason to know* are false; (2) clarifying the effect of a finding of liability under an administrative proceeding, as not automatically requiring a contractor's suspension or debarment; (3) clarifying that the assessment for false claims applies to double the amount *falsely* claimed rather than double the amount claimed; and (4) separating the position of investigating officials and reviewing officials so as to ensure independent prosecutorial review. Although we have not had time to thoroughly review the other subcommittee amendments, we consider the above changes, primarily designed to further insure that the administrative penalty system is fairly and objectively administered, to be improvements over the prior bill.

We commend your particular interest and efforts in this area, and we look forward to working with Congress in insuring the enactment of legislation authorizing agencies to levy administrative penalties, as a means of combating fraud, waste and abuse within government programs.

Sincerely yours,

MILTON J. SOCOLAR,
Comptroller General of the United States.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, November 4, 1985.

Hon. WILLIAM S. COHEN,
Chairman, Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Department of Justice strongly supports S. 1134, the Program Fraud Civil Remedies Act, as it was reported from the Oversight of Government Management Subcommittee. Both you and Senator Roth are to be commended for your leadership in moving forward with this important piece of legislation, and we urge you to expedite action at the full committee so that the bill can come to the floor of the Senate in this session.

The Department, the Inspectors General and this Committee have long recognized the need to develop some alternate dispute resolution mechanism for small fraud cases. Because of limited Justice Department resources and the growing caseload burden in the federal courts, it often is not cost effective to file suit in district court to collect on small-dollar frauds. Consequently, unless these cases are simply to be written off, we must develop a mechanism, such as S. 1134, which provides the government with a meaningful remedy.

We believe that the Committee has crafted an excellent bill, preserving all necessary due process protections without unduly complicating and delaying the adjudication process. The bill closely tracks the False Claims Act, the Civil War-era statute which the government has relied upon to bring civil and criminal fraud prosecutions, and follows the better-reasoned holdings of the courts under that statute. Notably, we believe that S. 1134 adopts a reasonable compromise in imposing liability on a person who "knows or has reason to know" that a claim was false. This standard would prohibit a corporate officer from avoiding liability by insulating himself from knowledge of the truth or falsity of the claims he is submitting. The bill correctly holds persons claiming money from the government to the duty to make "such inquiry as would be reasonable and prudent to conduct under the circumstances." Persons doing business with the United States should be under an obligation to make reasonable efforts to ensure that the claims which they submit are accurate.

We also believe that the bill properly requires the United States to prove a violation by a preponderance of the evidence—the traditional standard of proof in civil litigation. Raising the burden to that of clear and convincing evidence, as some have suggested, would, in our view, place an unwarranted burden on the government. For instance, the burden of proof in civil treble damage actions filed under the antitrust laws has always been a preponderance of the evidence. There is no justification for imposing any greater burden on the government in a program fraud proceeding.

Finally, Mr. Chairman, the Department of Justice and the Administration continue to object to section 804(a)(1)(C) of the bill, authorizing the Inspectors General to compel the testimony of witnesses. We do not believe that there is a demonstrable justification for such extraordinary powers and we are seriously concerned with the potential this provision creates for interference with ongoing criminal investigations. While we recognize that the proponents of S. 1134 have made efforts to accommodate our concerns on this issue, the proposed procedure for Department of Justice review of testimonial subpoenas is simply unworkable. Our views on this issue are set out in detail in the Deputy Attorney General's letter of August 26, 1985.

Sincerely,

PHILLIP D. BRADY,
Acting Assistant Attorney General.

DEPARTMENT OF HEALTH & HUMAN SERVICES,
OFFICE OF INSPECTOR GENERAL,
Washington, DC, October 21, 1985.

Hon. WILLIAM S. COHEN,
U.S. Senate, Washington, DC.

DEAR SENATOR COHEN: The Committee on Governmental Affairs is soon to consider S. 1134, the "Program Fraud Civil Remedies Act of 1985," reported out by the Subcommittee on Oversight of Government Management. The members of the Legislation Committee of the President's Council on Integrity and Efficiency (PCIE), representing the seventeen statutory Inspectors General, wish to express our unanimous and enthusiastic support for this important legislation. This bill would establish an administrative mechanism to impose civil monetary penalties and assessments for fraudulent claims and statements made to the United States. As the Federal officials who are charged with the formidable task of preventing and detecting fraud and abuse in our respective agencies, we strongly believe that the civil monetary penalties authority will provide an invaluable tool in efforts to combat fraud against the United States.

Experience has shown that the Justice Department does not possess the resources necessary to prosecute all meritorious civil fraud cases referred to it by the Inspectors General and by others. Further, certain cases may lack prosecutive merit for a variety of reasons—for example, loss to the Government is small or impossible to calculate or there is insufficient jury appeal. The result is that often the United States does not have the opportunity to recoup its losses, both actual damages and consequential damages, such as the cost of detection and investigation.

The bill to be considered by the Committee, S. 1134, offers an alternative to judicial remedies for fraud—and alternative that promises numerous benefits to the public. First, the authority would act as a powerful deterrent, particularly in those types of cases in which the Justice Department does not usually pursue civil action or criminal prosecution. Second, an administrative mechanism for resolution of fraud cases is both expeditious and relatively inexpensive. Third, an administrative alternative will relieve the Department of Justice of the burden of referrals of "smaller" fraud cases, thereby freeing that Department to more effectively allocate its own resources to the most significant cases. Finally, the proposed civil monetary penalties authority would provide a means of recovering sums that, heretofore, have been irretrievably lost to fraud.

In conclusion, we strongly urge the Committee to act favorably and expeditiously on S. 1134. At a time when every dollar lost to fraud adds to the existing budget deficit, we feel it is imperative to do whatever can be done for the taxpayers, and for the beneficiaries of Federal programs, in order to make sure that every Federal dollar is properly spent. We believe S. 1134 is one important means of moving toward that objective.

Sincerely yours,

Richard P. Kusserow, *Inspector General,*
Chairman, Legislation Committee,
President's Council on Integrity and Efficiency.

Members of Legislation Committee: Sherman M. Funk, Inspector General, U.S. Department of Commerce; John V. Graziano, Inspector General, U.S. Department of Agriculture; James R. Richards, Inspector General, U.S. Department of Energy; Joseph Sherick, Inspector General, U.S. Department of Defense; Mary F. Wieseman, Inspector General, Small Business Administration.

DEPARTMENT OF DEFENSE,
INSPECTOR GENERAL,
Washington, DC, November 14, 1985.

Hon. WILLIAM S. COHEN,
Chairman, Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Your staff has requested that I provide additional views on the Bill S. 1134, the "Program Fraud Civil Penalties Act of 1985." I understand this Bill is scheduled for mark-up by the Senate Governmental Affairs Committee in the near future.

I strongly support this legislation. Many frauds against Federal programs are not prosecuted because the Department of Justice often does not have sufficient resources to devote to fraud cases covered by this Bill. Since the Government has traditionally relied upon judicial proceedings to recover for false claims and statements, if a case is not prosecuted in Federal court the Government is left without any effective remedy.

The Program Fraud Civil Penalties Act would allow Departments such as the Department of Defense to impose an administrative penalty for false claims and statements, and to recover damages. The Department of Health and Human Services obtained similar statutory power in 1981 which has been highly successful in combating false claims in the Medicare and Medicaid programs. The Bill would allow a similar authority to be used in areas such as Defense procurement fraud.

Contrary to the assertions of certain contractors and organizations who oppose this Bill, it does not create a new category of offenses, nor does it deny due process. The Bill is designed to place an administrative penalty upon conduct which is already prohibited by Federal criminal and civil statutes relating to false claims and statements. Furthermore, the Supreme Court has repeatedly upheld other remedial statues which have contained due process provisions similar to S. 1134.

Sincerely,

JOSEPH H. SHERICK,
Inspector General.

FEDERAL BAR ASSOCIATION,
Washington, DC, November 1, 1985.

Re S. 1134.

Senator WILLIAM S. COHEN,
Chairman, Senate Subcommittee on Oversight of Government Management, Senate Hart Office Building, Washington, DC.

DEAR SENATOR COHEN: The D.C. Chapter of the Federal Bar Association through its Committee on the Administrative Judiciary has reviewed S. 1134, the Program Fraud Civil Remedies Act of 1985, and on behalf of the Chapter's 5,000 federal lawyers supports its enactment.

The provisions for selection, appointment, salary and tenure of the administrative adjudicators who will hear and decide civil fraud cases are in accord with longstanding safeguards of the status and decisional autonomy of administrative law judges under the Federal Administrative Procedure Act. Further, the guarantees of procedural due process spelled out in S. 1134 insure that constitutional requirements of fundamental fairness will be observed by the agencies engaged in its enforcement.

We appreciate the opportunity afforded us to participate in the formulation of one of the most important legislative initiatives of the 99th Congress. We believe this bill will significantly strengthen and reinforce the government's efforts to prevent waste, fraud and abuse in federal programs.

Sincerely yours,

JOSEPH B. KENNEDY,
Chairman, Committee on the Administrative Judiciary,
Federal Bar Association, District of Columbia Chapter.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES,
Washington, DC, October 18, 1985.

Hon. WILLIAM S. COHEN,
Chairman, Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, U.S. Senate, Washington, DC.

DEAR SENATOR COHEN: This is in response to your letter of October 9, requesting the comments of the Administrative Conference on S. 1134, the Program Fraud Civil Remedies Act of 1985.

We understand that the bill is at present in mark up and its details are subject to revision. Accordingly, we shall address only the major features of the bill.

S. 1134 would provide an administrative procedure for imposing civil penalties for false claims and statements made to the United States in connection with agency programs. It would cover a broad range of agencies and programs and be administered by the respective agencies. The procedure would be available only for relatively small cases, *i.e.*, those in which the amount involved in the claim was $100,000 or less. The maximum penalty would be $10,000 for each false claim or statement, plus twice the amount of any claim or portion of a claim. The procedure prescribed by the bill would include an initial investigation of the suspected false claim or statement by an investigating official who reports his findings to a reviewing official. If the reviewing official determines there is adequate evidence to indicate liability for civil penalties, he would refer the case for a formal adjudicative hearing under the Administrative Procedure Act, 5 U.S.C. §§ 554, 556 and 557, presided over by an administrative law judge of the agency. (We understand that proceedings in the military departments would not be governed by the Administrative Procedure Act but by procedures prescribed in the bill and generally similar to those in the APA. We have not studied these provisions of the bill, and we limit our comments to those proceedings governed by the APA.) If the administrative law judge determines on a preponderance of the evidence that the respondent had made a false or fraudulent claim or statement, he could impose the appropriate penalty. The respondent could obtain review of the ALJ decision by the agency head or his delegate and judicial review of an adverse agency determination in the United States Court of Appeals. Such review would be on the administrative record in accordance with the substantial evidence rule, 5 U.S.C. § 706(e).

At the time the recommendation was adopted comparatively few statutes provided for administrative, as opposed to judicial, imposition of civil penalties.[1] However, in recent years, in response in part, perhaps, to the Conference recommendation and, certainly, to the increasingly urgent need to alleviate the burden on the Federal courts, Congress has frequently provided for administrative imposition under procedures similar to those set forth in S. 1134.[2] In 1979 the Conference in its Recommendation No. 79-3, Agency Assessment and Mitigation of Civil Penalties, 1 CFR § 305.79-3 (copy enclosed) reaffirmed its support of administrative imposition and welcomed the increased use of such procedures since its 1972 recommendation.

Part B, Paragraph 1 of the Conference recommendation lists some of the factors the presence of which argue for a system of administrative imposition. Among these factors, an anticipated large volume of cases, the relatively small penalties involved, the importance of speedy adjudication, and the unlikelihood that issues of law will arise calling for judicial resolution, all seem common to the range of cases covered by S. 1134. In addition, in many cases the availability of an effective and credible civil penalty remedy may enable an agency to forego a harsher remedy, such as debarment or disqualification from the program. Another factor cited in the recommendation is the availability of an impartial forum in which cases can be efficiently and fairly decided. We have confidence that the procedure provided in S. 1134, an on-the-record adjudicatory hearing before an administrative law judge, offers such a forum. Furthermore, we note that the procedural system provided in the bill (except that which would apply to the military departments, as to which we have reserved comment) fully complies with Paragraph 2 of Part B of our recommendation.

Accordingly, we believe that the general features of S. 1134 are consistent with Conference Recommendations 72-6 and 79-3 and that they merit the favorable consideration of Congress.

Sincerely yours,

MARK S. FOWLER,
Acting Chairman.

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[1] The report of the Conference's consultant concluded that only four statutory schemes provided for "true administrative imposition," *i.e.*, without a *de novo* judicial determination. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, 2 ACUS 896, 907-08.

[2] See, *e.g.*, Migrant and Seasonal Agricultural Worker Protection Act, § 503, 29 U.S.C.A. § 1853; Medicare and Medicaid Amendments of 1981, P.L. 97-35, Tit. xxi, 42 U.S.C. § 1320a-7a; Communications Act Amendments of 1978, § 2, 47 U.S.C. § 503(b); Toxic Substances Control Act, § 16, 15 U.S.C. § 2615.

THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE,
Washington, DC, November 25, 1985.

Subject: S. 1134—Program Fraud Civil Remedies Act of 1985.

Mr. JEFFREY A. MINSKY,
Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, Dirksen Senate Office Building, Washington, DC.

DEAR MR. MINSKY: I am pleased to inform you that, on November 22, 1985, the Executive Committee of the Federal Administrative Law Judges Conference (FALJC) formally voted to endorse and support S. 1134, the Program Fraud Civil Remedies Act of 1985, as it appears in the Committee print dated November 15, 1985.

The FALJC endorsement is embodied within the terms of the enclosed resolution which was adopted by this organization's Executive Committee on November 22.

Please continue to advise us of the Bill's progress. If we may assist you in any way to gain enactment, do not hesitate to call.

Very sincerely,

Judge NORMAN ZANKEL,
Chairman, Legislative Committee.

Enclosure.

> Be it Resolved that:
>
> The Federal Administrative Law Judges Conference endorses and supports S. 1134, the Program Fraud Civil Remedies Act of 1985, with the understanding that (as provided in the November 15, 1985 print of the Senate Subcommittee on Oversight of Government Management) the hearing officers who will conduct the administrative hearings are either Administrative Law Judges appointed pursuant to 5 USC 3105 or persons who possess administrative Law Judge qualifications; and who will enjoy the safeguards of the status and decisional autonomy of Administrative Law Judges under the federal Administrative Procedure Act; and further provided that such administrative hearings will be conducted pursuant to the requirements of the federal Administrative Procedure Act to insure that constitutional requirements of procedural due process and fundamental fairness will be observed by the agencies and departments engaged in enforcement of program fraud legislation.

IX. SECTION-BY-SECTION ANALYSIS OF S. 1134

SECTION 1

The short title of this bill is the Program Fraud Civil Remedies Act of 1985.

SECTION 2

Section 2(a) sets forth congressional findings which state that false claims and statements in government programs are a serious problem, resulting in the loss of millions of dollars annually as well as undermining the integrity of the programs, and that present civil and criminal remedies are not sufficiently responsive to this problem.

Section (2)(b) establishes the purposes of the Act which are (1) to provide federal agencies with an administrative remedy to recompense agencies for losses, to permit administrative proceedings to be brought against the persons who submit false claims or statements, and to deter such fraudulent behavior in the future, and (2) to provide due process protections to all persons who are subject to the administrative adjudication of false claims and statements.

SECTION 3

Section 3 amends title 5 of the U.S. Code (5 U.S.C. § 101 *et seq.*) by adding a new chapter 8 on "Administrative Remedies for False Claims and Statements." Chapter 8 contains 10 sections.

Section 801—Definitions

Section 801(a) provides definitions of key terms used in the bill. Section 801(a)(1) defines "authority" to include executive departments, military departments, establishments as defined in the Inspector General Act of 1978, and the U.S. Postal Service.

Section 801(a)(2) defines "authority head" as the head of the authority, or his or her designee.

"Claim" is defined in section 801(a)(3) as meaning any request, demand or submission which is (A) made to an authority for property, services, or money; (B) made to a recipient of property, services, or money from an authority or to be a party to a contract with an authority for property, services, or money if the United States has provided in whole or in part the property, services, or money; or (C) made to an authority which has the effect of decreasing an obligation to pay or account for property, services or money.

Section 801(a)(4)(A) requires "hearing examiners," who preside over the administrative proceeding established by the bill, to be administrative law judges—either appointed (5 U.S.C. §3105) or detailed (5 U.S.C. §3344)—for those authorities subject to the provisions of the Administrative Procedure Act. For those authorities not subject to the APA, section 801(a)(4)(B) requires that the officials or employees of the authority appointed to serve as hearing examiner must meet the same criteria as an administrative law judge.

These criteria require that the official be (i) selected through the competitive examination process applicable to administrative law judges (5 U.S.C. §3301 *et seq.*), (ii) appointed by the agency head (5 U.S.C. §3105), (iii) assigned to cases in rotation so far as practicable, (5 U.S.C. §3105), (iv) prohibited from performing duties inconsistent with the duties and responsibilities of a hearing examiner (5 U.S.C. §3105), (v) entitled to pay prescribed by the Office of Personnal Management independent of agency rating and recommendations (5 U.S.C. §5372), and (vi) subject to removal, suspension, furlough or reduction in grade or pay only for good cause after a hearing before the Merit System Protection Board (5 U.S.C. §7521).

"Investigating official" is defined in section 801(a)(5) to be the Inspector General (IG) for authorities that have statutory ICs; an officer or employee of the authority designated by the authority head for those authorities that do not have statutory IGs; or, for the military departments, the Department of Defense IG. This section allows for delegation of responsibility, but requires in all cases that the investigating official be a grade GS-16 or above if a civil employee, or grade 0-7 or above if a member of the Armed Forces.

Section 801(a)(6) defines the state of culpability—"knows or has reason to know"—which the government must prove in order to establish liability under the Act. The definition specifies that, for purposes of establishing liability under section 802, a person "knows or has reason to know" when he or she either has actual knowledge that the claim or statement submitted is false, fictitious, or fradulent, or acts in gross negligence of the duty to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim or statement. The person is not considered to have knowledge, and therefore would not be subject to liability, if the person's failure to obtain knowledge is due to more negligence, mistake, or inadvertence.

"Person" is defined in section 801(a)(7) to mean any individual, partnership, corporation, association, or private organization.

The "reviewing official," who is responsible for determining whether there is adequate evidence that a false claim or statement has been submitted, is defined in section 801(a)(8) to be any officer or employee designated by the authority head who meets the same grade criteria required of investigating officials. This section further stipulates that a reviewing official shall not be supervised by, or required to report to, the investigating official, and shall not be employed in the same office as the investigating official.

Sections 801(a)(9) defines "statement" as any written representation, certification, document, record or accounting or bookkeeping entry pertaining to (A) a claim or (B)(i) a contract or bid or proposal for a contract, (ii) a grant, loan, or benefit, (iii) an insurance application, or (iv) an employment application with an authority or any state, political subdivision of a state, or any other party acting on behalf of an authority.

Section 801 (b) and (c) supplement the definitions of "claim" and "statement," respectively, by specifying what constitutes a separate claim or statement, and when a claim or statement is considered to have been made. Section 801(b) also specifies that claims for property, services, or money are subject to this bill regardless of whether the property, services, or money is actually delivered or paid.

Section 802—False claims and statements; liability

Section 802(a) provides the "charging" language for establishing liability under the bill, with subsection (1) applying to claims and subsection (2) to statements.

Section 802(a)(1) states that a person is liable for submitting a claim that he or she "knows or has reason to know" is either (A) false, fictitious, or fraudulent, (B) includes or is supported by a false statement, or (C) is for payment for property or services which have not been provided as claimed. A person found liable would be subject to a civil penalty of up to $10,000 for each false claim, plus an assessment of up to double the amount falsely claimed.

Section 802(a)(2) states that a person is liable for submitting a statement that he or she "knows or has reason to know" either (A) asserts a material fact which is false, or (B) omits a material fact which, as a result of the omission, makes the statement false, and which the person making the statement has a duty to include in his or her statement. The civil penalty for persons found liable would be up to $10,000 for each false statement.

Section 802(b) addresses the linkage between a Program Fraud proceeding and other administrative proceedings, such as a suspension and debarment. Section 802(b)(1) states that either a determination under section 803(a)(2) that there is adequate evidence to believe that a person is liable, or a determination under section 803 that a person is liable, may provide the authority with the grounds for commencing any administrative or contractual action against the person. Section 802(b)(2) stipulates, however, that neither of these determinations requires the authority to take such administrative or contractual action.

With respect to a suspension or debarment, section 802(b)(3) states that a Program Fraud determination shall not be considered as a "conclusive determination" of a person's present responsibility under federal procurement laws and regulations.

Section 803—Hearing and determinations

This section establishes the procedures for undertaking a Program Fraud proceeding, starting with the investigation, the review process, the hearing, and the administrative appeals process.

Section 803(a) sets forth the investigative and review stages. Section 803(a)(1) authorizes the investigating official to investigate allegations that a person is liable under section 802, and requires the investigating official to report the findings and conclusions of the investigation to the authority's reviewing official. The investigating official must report violations of criminal law to the Attorney General.

The reviewing official is authorized by section 803(a)(2) to review the investigating official's report to determine whether there is adequate evidence to believe that the person is liable under the Act. If there is adequate evidence, the reviewing official shall notify the Attorney General of his or her intention to refer the allegations to a hearing examiner of the authority. This section states that the notice to the Attorney General shall include (A) a statement of the reviewing official's reasons for referring the allegations of liability to a hearing examiner, (B) a statement specifying the evidence supporting the allegations, (C) a description of the claims of statements for which liability is alleged, (D) an estimate of the money, or value of property or services, requested or demanded in violation of section 802, and (E) a statement of any exculpatory or mitigating circumstances that may relate to the claims or statements.

Section 803(b)(1) states that the reviewing official may refer the allegations to the hearing examiner only if the Attorney General or an Assistant Attorney General either (A) approves the referral, or (B) within ninety days of having received the reviewing official's notice, takes no action to disapprove it.

In the event the Attorney General declines prosecution, but also wants to preclude the authority from taking administrative action against the claim or statement, section 803(b)(2) authorizes the Attorney General or his designee to disapprove the referral by notifying the reviewing official and stating the reasons for the disapproval. The Attorney General or his designee also is authorized under section 803(b)(3) to stay a hearing upon notification to the authority head that continuation of the hearing could adversely affect any pending or potential criminal or civil action related to the claim or statement.

Section 803(c) establishes a $100,000 jurisdictional cap on claims that can be adjudicated administratively under the bill. This section prohibits the referral of any allegation or liability to a hearing examiner pertaining to a false claim that the reviewing official determines is for money in excess of $100,000 or for property or services with a value in excess of $100,000. The cap would apply to any claim, or false portion thereof, and any related claims which are submitted at the same time.

On the date on which the reviewing official is permitted to refer the allegations of liability to a hearing examiner pursuant to section 803(b)(1), the reviewing official is required under section 803(b)(1) to send a "complaint"—setting forth the allegations and the person's right to request a hearing—to the person alleged to be liable. Section 803(d)(2) states that, if the person alleged to be liable requests a hearing within 30 days of having been notified, the reviewing official shall refer the allegations to the agency's hearing examiner, and the hearing examiner shall commence a hearing by notifying the person of the time, date and place of the hearing, along with other pertinent information.

Section 803(e) authorizes the hearing examiner to conduct a hearing "on the record," thereby triggering the procedures and due process protections of the Administrative Procedure Act. The hearing examiner is responsible for determining whether or not the person is liable, and, if so, the amount of any penalty and assessment to be imposed. This determination is to be based on a "preponderance of the evidence," the standard applied in most civil litigation and administrative proceedings.

Section 803(f)(1) sets forth the procedures under which the hearing is to be conducted. For authorities covered by the Administrative Procedure Act, section 803(f)(1)(A) requires those agencies to comply with APA procedures in conducting the hearing, as well as the additional procedures provided in section 803(f)(3). Section 803(f)(1)(B) requires that, for agencies not covered by the APA, the authority head shall promulgate procedures for conducting the hearing which parallel the APA procedures, in addition to those provided in section 803(f)(3).

Section 803(f)(2) lists the procedures for non-APA authorities to follow, including: (A) a notice to the person alleged to be liable to the agencyhearing with time, place, nature, legal authority, jurisdiction, and matters of fact and law to be asserted, (B) an opportunity for the person to submit facts, arguments, and offers of settlement, (C) procedures to ensure for a neutral decision maker, (D) procedures to ensure that the investigating official and the reviewing official do not participate in the hearing examiner's or authority head's decision, (E) an opportunity to present oral or documentary evidence, to submit rebuttal evidence, and to conduct cross-examination as may be required for a full and true disclosure of the facts, (F) the right of the person alleged to be liable to be accompanied, represented and advised by counsel, and (G) procedures to ensure that the hearing is conducted in an impartial manner.

Section 803(f)(3)(A) provides additional procedures which both APA and non-APA authorities would be required to follow in conducting a hearing. Section 803(f)(3)(B)(i) provides for an expanded notice describing the procedures for the conduct of the hearing. Section 803(f)(3)(B)(ii) provides limited discovery procedures for persons alleged to be liable to the extent the hearing examiner determines that such discovery is necessary for the expeditious, fair, and reasonable consideration of the issues. Information pertaining to case referral required under section 803(a)(2), however, would not be subject to discovery. This section also states that requests for discovery shall not be unreasonably denied.

Section 803(f)(4) specifies that hearings conducted under section 803(e) are to be held either (A) in the judicial district in which the person alleged to be liable resides or transacts business, (B) in the judicial district in which the claim or statement upon which the allegation of liability is based was made, or (C) in such other place agreed to by the person and the hearing examiner presiding over the hearing.

The hearing examiner is required under section 803(g) to issue a written decision, including findings and determinations, after the conclusion of the hearing. This decision is to include the findings of fact and conclusions of law which the hearing examiner relied on in making his or her determination of liability. The section also requires the hearing examiner to send to each party to the hearing a copy of the decision and a statement describing the right of any person determined to be liable to appeal the decision to the authority head.

Section 803(h)(1) states that the hearing examiner's decision is final, unless it is appealed to the authority head or to the U.S. Court of Appeals. Section 803(h)(2) provides the procedures for appealing the hearing examiner's decision to the authority head. Within 30 days after the hearing examiner issues a decision, the person alleged to be liable is given the right to appeal to the authority head. In reviewing the hearing examiner's decision, findings and determinations, the authority head is prohibited under section 803(h)(2) from considering any objection that the person alleged to be liable had not previously raised in the hearing, unless the person can demonstrate that extraordinary circumstances precluded him or her from raising the objection. In that case, the authority head shall remand the matter to the hearing examiner for consideration of the additional evidence. The authority head is otherwise authorized to affirm, reduce, reverse, compromise, remand, or settle the case, and is required to send each party to the appeal a copy of the decision and a statement describing the right of any person determined to be liable to appeal the decision to the U.S. Court of Appeals.

Section 803(i) authorizes the reviewing official to compromise or settle any allegations of liability after the Justice Department approves referral of the case to the agency and up to the time the agency's hearing examiner issues a decision. The compromise or settlement is required to be in writing.

Section 804—Subpoena authority

This section provides both the investigating official and the hearing examiner with subpoena authority.

Section 804(a)(1) authorizes the investigating official, for purposes of conducting an investigation under section 803(a)(1), to (A) administer oaths or affirmations and (B) require by subpoena the production of all documents, reports, records, and other information not otherwise reasonably available. Section 804(a)(2) further authorizes the investigating official to require by subpoena the attendance and testimony of witnesses if the invetigating official notifies the Attorney General that such attendance and testimony are necessary to the conduct of the investigation. The Attorney General is, however, authorized to veto the use of this authority within 45 days of being notified by the investigating official. As an additional safeguard against abuse, section 804(a)(3) limits the testimonial subpoena authority to investigating officials who are statutory Inspectors General.

Section 804(a)(4) requires that each testimonial subpoena issued shall prescribe a date, time, and place at which oral testimony will be taken, describe the procedures that will be followed, and identify the investigating official conducting the investigation.

Due process protections are afforded under section 804(a)(5) to persons subpoenaed to testify. Subsection (A) requires that the investigating official taking the testimony shall put the person testifying under oath or affirmation and shall record and transcribe the person's testimony. The investigating official is required under subsection (B) to exclude from the place where the testimony is taken all persons except the person giving the testimony, the person's attorney, the investigating official's attorney, any other person agreed to by the parties involved, and a stenographer. Subsection (C) stipulates that the testimony shall be taken either in the judicial district in which the subpoenaed person resides or transacts business, or in any other place agreed to by the person and the investigating official. The person subpoenaed to testify is permitted under subsection (D) to be accompanied, represented, and advised by an attorney.

Subsection (E) requires the investigating official to permit the person to review the transcript of his or her recorded testimony and to identify on the transcript changes which the person wishes to make. The transcript shall then be signed by the person subpoenaed to testify. If the person waives the signing, is ill, cannot be found, or refuses to sign, the investigating official would sign the transcript. The investigating official must certify on the transcript, under subsection (F), that the person giving testimony was duly sworn by the investigating official and that the transcript is a true record of the testimony given by the person. Subsection (G) requires that a copy of the transcript be made available to the person subpoenaed at a reasonable fee.

Finally, subsection (H) entitles the person subpoenaed to the same fees and mileage which are paid to witnesses in the district courts.

Section 804(b) authorizes the hearing examiner, for the purposes of conducting a hearing, to administer oaths and affirmations and to subpoena the attendance and testimony of witnesses, as well as the production of documents, reports, records, and other information that the hearing examiner considers relevant and materials to the hearing. There are no other limitations or restrictions on the hearing examiner's testimonial subpoena authority.

In the case where a person refuses to obey a subpoena issued pursuant to section 804(a) or (b), section 804(c) states that an investigating official or hearing examiner may request the Attorney General to invoke the aid of a U.S. district court to enforce the subpoena.

Section 805—Judicial review

Section 805(a) states that the reviewing official's determination of adequate evidence, as well as the jurisdictional determination that the false claim is under $100,000, shall not be subject to judicial review.

Section 805(b)(1)(A) provides persons who are determined to be liable under section 802 the right to obtain review of the authority's determination in the U.S. Court of Appeals for the circuit in which the person resides or in which the claim or statement found liable is made.

A person seeking judicial review must file a petition under section 805(b)(1)(B) after all administrative remedies have been exhausted and within 60 days after the authority head has issued his or her decision.

Once such a petition has been filed, section 805(b)(2) requires the clerk of the court to send a copy of the petition to the authority head and to the Attorney General. The authority head is then required to send to the Attorney General a copy of the record of the proceeding resulting in the determination of liability.

Section 805(b)(2) authorizes the U.S. Court of Appeals to review the decision, findings, and determinations of the authority and to affirm, modify, remand for further consideration, or set aside, in whole or in part, the hearing examiner's or authority head's decision, findings, and determinations.

Section 805(c) states that the hearing examiner's findings, with respect to questions of fact, shall be final and conclusive and shall not be set aside unless the hearing examiner's decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, of if such findings are not supported by substantial evidence.

Any court of appeals reviewing an authority's decision, findings, and determinations is prohibited under section 805(d) from considering any objection that was not raised in the hearing conducted pursuant to section 803(e), unless a party demonstrates to the satisfaction of the court that additional evidence not presented at the hearing is material and that there were reasonable grounds for failing to present the evidence at the hearing. In that case, the court is directed to remand the matter to the authority's hearing examiner for consideration of the additional evidence.

Section 805(e) states that, upon a final determination by the Court that a person is liable, the court shall enter a final judgment for the appropriate money owed to the United States.

Section 806—Collection of civil penalties and assessments

Section 806(a) authorizes the Attorney General to be responsible for judicial enforcement of any civil penalty or assessment imposed under this Act.

Any penalty or assessment may be recovered, according to section 806(b), in a civil action brought by the Attorney General. This section prohibits any matter that was raised or could have been raised in either a hearing or an appeal from being used as a defense in such a civil action. The determination of the amount of the penalty and assessment is not subject to review.

Section 806(c) states that the U.S. district courts have jurisdiction of any civil action commenced under subsection (b). Any civil action brought under subsection (b) is authorized under subsection (d) to be joined and consolidated with, or asserted as a counterclaim, cross-claim, or setoff by the U.S., any other civil action which includes the persons against whom the action is brought. The U.S. Claims Courts is given jurisdiction in subsection (e) for any civil action asserted by the United States as a counterclaim in a matter pending before the court.

The Attorney General has the exclusive authority in section 806(f) to compromise or settle any penalty and assessment, the determination of which is subject to a pending petition for judicial review or a pending action to recover.

Section 806(g) states that any penalty and assessment collected shall be deposited as miscellaneous receipts in the U.S. Treasury.

Section 807—Right to setoff

Section 807(a)(1) authorizes the authority to deduct from any sum owed by the United States to a person found liable under this Act, the amount of penalty and assessment owed by that person to the United States. This subsection specifically excludes, however, the use of Federal tax refunds for setoff purposes.

The authority is required under section 807(a)(2) to notify the person found liable under the Act of any deduction made against sums otherwise owed to that person. All amounts retained through setoff, according to section 807(a)(3), shall be deposited as miscellaneous receipts in the U.S. Treasury.

Section 808—Limitations

Section 808(a) establishes a six-year statute of limitations for claims and statements to be adjudicated under this Act, starting from the date the claim or statement is submitted.

For civil actions to recover penalties and assessments, section 808(b) establishes a three-year statute of limitations from the time the determination of liability for the penalty and assessment becomes final.

Section 808(c) states that, at any time during the course of proceedings, the authority head is required to report to the Attorney

General any information regarding bribery, gratuities, conflict of interest, or other corruption that was discovered during the proceeding.

Section 809—Regulations

The authority head is required by section 809(a) to promulgate rules and regulations within 180 days after the date of enactment which are necessary to implement the provisions of the Act.

Section 809(b) authorizes the Attorney General to enter into a memorandum of understanding with the head of any authority to provide expeditious procedures for approving or disapproving the referral of allegations, as well as for seeking judicial review and collecting penalties and assessments owed.

Section 810—Reports

This section requires the authority head to prepare a report, no later than October 31 of each year, summarizing actions taken the previous year under the Act. Section 810 specifies that the report is to include a summary of (1) matters referred by the authority's investigating official to the reviewing official for consideration, (2) matters transmitted to the Attorney General for approval or disapproval, (3) hearings conducted by the authority's hearing examiners and the results of those hearings, and (4) actions taken during the year to collect any civil penalty or assessment owed.

The authority head is required to transmit this annual report to the appropriate congressional committees and subcommittees.

SECTION 4

Section 4 states that the Program Fraud Civil Remedies Act shall take effect on the date of enactment and shall apply to any claim or statement made on or after that date.

X. ESTIMATED COST OF LEGISLATION

The Committee does not intend that this measue authorizes any additional budget authority for fiscal 1986 than that already available to the Federal agencies affected by this legislation. The Committee intends that any fiscal 1986 costs incurred from the bill will be absorbed from existing funds.

CBO COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, December 3, 1985.

Hon. WILLIAM V. ROTH, Jr.,
Chairman, Committee on Governmental Affairs, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1134, the Program Fraud Civil Remedies Act of 1985, as ordered reported by the Senate Committee on Governmental Affairs, November 19, 1985. We estimate that the enactment of this bill would result in no significant cost to the federal government and in no impact on the budgets of state or local governments. The federal government may receive increased revenues from the civil penalties authorized by the bill, and may attain savings if the penalties deter some fraudulent activity, but the amount of such penalties and savings cannot be estimated with precision.

S. 1134 establishes pocedures by which the heads of certain federal departments or agencies may impose civil penalties on any person or organization that knowingly makes false claims or statements to that agency, or to intermediaries that disburse federal funds. The bill would apply to all cases of fraud not exceeding $100,000. A person accused of fraud would be entitled to a hearing conducted by a person meeting the qualifications of an administrative law judge. The head of an agency could impose maximum penalties of a $10,000 fine, plus double the amount falsely claimed. The bill gives the U.S. Attorney General responsibility for enforcement of penalties, and all collections would be deposited in the general fund of the Treasury. Judicial review could be obtained in the U.S. Court of Appeals. The provisions of the bill would take effect upon enactment, and would apply to claims or statements made on or after that date.

We expect that the federal government would receive additional revenues from civil penalties imposed as a result of the enactment of this bill. In 1981, the General Accounting Office published a comprehensive study of fraud in government programs *(Fraud in Government Programs: How Extensive Is It? How Can It Be Controlled?*, AFMD-81-73). Based on that study, it appears that 10,000–15,000 cases of fraud involving amounts of $100,000 or less, with known participants, are identified annually. Such cases were estimated to cost government $30 million to $40 million a year. There is no clear basis for projecting the frequency or the amount of the fines that would be levied as a direct result of enactment of S. 1134. As an example, however, if an average fine of $50,000 were levied for 150 cases per year, additional revenues wold total $7.5 million annually. These revunues would be offset somewhat by the additional administrative, judicial, and enforcement costs incurred by the various agencies to implement the bill. Because the provisions of the bill would apply only to claims made subsequent to enactment, no revenues would be realized until 1987 or 1988.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

RUDOLPH G. PENNER,
Director.

XI. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory and paperwork impact of S. 1134, the Program Fraud Civil Remedies Act of 1985.

S. 1134, as reported, establishes an administratrive mechanism, employing Administrative Procedure Act requirements and due process protections, to adjudicate small-dollar false claim or statement cases under $100,000 that the Justice Department has declined to litigate. While the bill requires Federal agencies to promulgate rules and regulations necessary to implement this administrative mechanism, the Committee does not believe this will result in any regulatory impact on those individuals who may be subject to the bill's provisions, since they would already be covered under the False Claims Act. The Committee also does not foresee any significant paperwork impact resulting from this legislation.

XII. Vote in Committee

The Committee, a quorum being present, reported S. 1134 by voice vote on November 19, 1985. Senator Cochran expressed his opposition to the legislation.

XIII. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italic; and existing law in which no changes are proposed is shown in roman):

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES

*   *   *   *   *   *   *

PART I—THE AGENCIES GENERALLY

*   *   *   *   *   *   *

CHAPTER 7—JUDICIAL REVIEW

*   *   *   *   *   *   *

"CHAPTER 8—ADMINISTRATIVE REMEDIES FOR FALSE CLAIMS AND STATEMENTS

"Sec.

"801. Definitions.
"802. False claims and statements; liability.
"803. Hearing and determinations.
"804. Subpena authority.
"805. Judicial review.
"806. Collection of civil penalties and assessments.
"807. Right to setoff.
"808. Limitations.
"809. Regulations.
"810. Reports.

"§ 801. Definitions

"(a) For purposes of this chapter—

"(1) 'authority' means—

"(A) an executive department;

"(B) a military department;

"(C) an establishment (as such term is defined in section 11(2) of the Inspector General Act of 1978) which is not an executive department; and

"(D) the United States Postal Service;

"(2) 'authority head' means—

"(A) the head of an authority; or

"(B) an official or employee of the authority designated, in regulations promulgated by the head of the authority, to act on behalf of the head of the authority;

"(3) 'claim' means any request, demand, or submission—

"(A) made to an authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

"(B) made to a recipient of property, services, or money from an authority or to a party to a contract with an authority—

"(i) for property or services if the United States—

"(I) provided such property or services;

"(II) provided any portion of the funds for the purchase of such property or services; or

"(III) will reimburse such recipient or party for the purchase of such property or services; or

"(ii) for the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

"(I) provided any portion of the money requested or demanded; or

"(II) will reimburse such recipient for any portion of the money paid on such request or demand; or

"(C) made to an authority which has the effect of decreasing an obligation to pay or account for property, services, or money;

"(4) 'hearing examiner' means—

"(A) in the case of an authority to which the provisions of subchapter II of chapter 5 of this title apply, an administrative law judge appointed in the authority pursuant to section 3105 of this title or detailed to the authority pursuant to section 3344 of this title; or

"(B) in the case of an authority to which the provisions of such subchapter do not apply, an officer or employee of the authority who—

"(i) is selected under chapter 33 of this title pursuant to the competitive examination process applicable to administrative law judges;

"(ii) is appointed by the authority head to conduct hearings under section 803 of this title;

"(iii) is assigned to cases in rotation so far as practicable;

"(iv) may not perform duties inconsistent with the duties and responsibilities of a hearing examiner;

"(v) is entitled to pay prescribed by the Office of Personnel Management independently of ratings and recommendations made by the authority and in accordance with chapter 51 of this title and subchapter III of chapter 53 of this title;

"(vi) may be removed, suspended, furloughed, or reduced in grade or pay only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing by such Board;

"(5) 'investigating official' means an individual who—

"(A)(i) in the case of an authority in which an Office of Inspector General is established by the Inspector General Act of 1978 or by any other Federal law, is the Inspector General of that authority or an officer or employee of such Office designated by the Inspector General;

"(ii) in the case of an authority in which an Office of Inspector General is not established by the Inspector General Act of 1978 or by any other Federal law, is an officer or employee of the authority designated by the authority head to conduct investigations under section 803(a)(1) of this title; or

"(iii) in the case of a military department, is the Inspector General of the Department of Defense or an officer or employee of the Office of Inspector General of the Department of Defense who is designated by the Inspector General; and

"(B) who, if a member of the Armed Forces of the United States on active duty, is serving in grade 0–7 or above or, if a civilian employee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 or above under the General Schedule;

"(6) 'knows or has reason to know', for purposes of establishing liability under section 802, means that a person, with respect to a claim or statement—

"(A) has actual knowledge that the claim or statement is false, fictitious, or fraudulent; or

"(B) acts in gross negligence of the duty to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim or statement;

"(7) 'person' means any individual, partnership, corporation, association, or private organization;

"(8) 'reviewing official' means any officer or employee of an authority—

"(A) who is designated by the authority head to make the determination required under section 803(a)(2) of this title;

"(B) who, if a member of the Armed Forces of the United States on active duty, is serving in grade 0–7 or above or, if a civilian employee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 or above under the General Schedule; and

"(C) who is—

"(i) not subject to supervision by, or required to report to, the investigating official; and

"(ii) not employed in the organizational unit of the authority in which the investigating official is employed; and

"(9) 'statement' includes any written representation, certification, document, record, or accounting or bookkeeping entry—

"(A) with respect to a claim; or

"(B) with respect to—

"(i) a contract with, or a bid or proposal for a contract with;

"(ii) a grant, loan, or benefit from;

"(iii) an application for insurance from; or

"(iv) an application for employment with,

an authority, or any State, political subdivision of a State, or other party acting on behalf of, or based upon the credit or guarantee of, an authority.

"(b) For purposes of paragraph (3) of subsection (a)—

"(1) each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim;

"(2) each claim for property, services, or money is subject to this chapter regardless of whether such property, services, or money is actually delivered or paid; and

"(3) a claim shall be considered made, presented, or submitted to an authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity including any State or political subdivision thereof, acting for or on behalf of such authority, recipient, or party.

"(c) For purposes of paragraph (9) of subsection (a)—

"(1) each written representation or certification constitutes a separate statement; and

"(2) a statement shall be considered made, presented, or submitted to an authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority.

"§ 802. False claims and statements; liability

"(a)(1) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know—

"(A) is false, fictitious, or fraudulent;

"(B) includes or is supported by any statement which violates paragraph (2) of this subsection; or

"(C) is for payment for the provision of property or services which the person has not provided as claimed,

shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $10,000 for each such claim. Such person shall also be subject to an assessment, in lieu of damages sustained by the United States because of such claim, of not more than twice the amount of such claim, or the portion of such claim, which is determined under this chapter to be in violation of the preceding sentence.

"(2) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a statement that the person knows or has reason to know—

"(A) asserts a material fact which is false, fictitious, or fraudulent; or

"(B)(i) omits a material fact,

"(ii) as a result of such omission, such statement is false, fictitious, or fraudulent, and

"(iii) the person making, presenting, or submitting such statement has a duty to include such material fact in the statement, shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $10,000 for each such statement.

"(b)(1) Except as provided in paragraphs (2) and (3) of this subsection—

"(A) a determination under section 803(a)(2) of this title that there is adequate evidence to believe that a person is liable under subsection (a) of this section, or

"(B) a determination under section 803 of this title that a person is liable under subsection (a) of this section,

may provide the authority with grounds for commencing any administrative or contractual action against such person which is authorized by law and which is in addition to any action against such person under this chapter.

"(2) A determination referred to in paragraph (1) of this subsection may be used by the authority, but shall not require such authority, to commence any administrative or contractual action which is authorized by law.

"(3) In the case of an administrative or contractual action to suspend or debar any person who is eligible to enter into contracts with the Federal Government, a determination referred to in paragraph (1) of this subsection shall not be considered as a conclusive determination of such person's responsibility pursuant to Federal procurement laws and regulations.

"§ 803. Hearing and determinations

"(a)(1) The investigating official of an authority may investigate allegations that a person is liable under section 802 of this title and shall report the findings and conclusions of such investigation to the reviewing official of the authority. The preceding sentence does not modify any responsibility of an investigating official to report violations of criminal law to the Attorney General.

"(2) If the reviewing official of an authority determines, based upon the report of the investigating official under paragraph (1) of this subsection, that there is adequate evidence to believe that a person is liable under section 802 of this title, the reviewing official shall transmit to the Attorney General a written notice of the intention of such official to refer the allegations of such liability to a hearing examiner of such authority. Such notice shall include—

"(A) a statement of the reasons of the reviewing official for the referral of such allegations;

"(B) a statement specifying the evidence which supports such allegations;

"(C) a description of the claims or statements for which liability under section 802 of this title is alleged;

"(D) an estimate of the amount of money or the value of property or services requested or demanded in violation of section 802 of this title; and

"(E) a statement of any exculpatory or mitigating circumstances which may relate to such claims or statements.

"(b)(1) A reviewing official may refer allegations of liability to a hearing examiner if—

"(A) the Attorney General or an Assistant Attorney General designated by the Attorney General approves the referral of such allegations; or

"(B) the Attorney General or an Assistant Attorney General designated by the Attorney General takes no action to disapprove the referral of such allegations within 90 days after the date on which the Attorney General receives the notice required by paragraph (2) of subsection (a).

"(2) A reviewing official shall not refer allegations to a hearing examiner if the Attorney General or an Assistant Attorney General designated by the Attorney General transmits a written statement to the reviewing official which specifies that the Attorney General or such Assistant Attorney General disapproves the referral of such allegations and states the reasons for such disapproval.

"(3) If the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to an authority head a written finding that the continuation of any hearing under section 803 of this title with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, such hearing shall be immediately stayed and may be resumed only upon written authorization of the Attorney General.

"(c) No allegations of liability under section 802 of this title with respect to any claim made, presented, or submitted by any person shall be referred to a hearing examiner under paragraph (1) of subsection (b) if the reviewing official determines that—

"(1) an amount of money in excess of $100,000; or

"(2) property or services with a value in excess of $100,000,

is requested or demanded in violation of section 802 of this title in such claim or in a group of related claims which are submitted at the time such claim is submitted.

"(d)(1) On the date on which a reviewing official is permitted to refer allegations of liability to a hearing examiner under paragraph (1) of subsection (b), the reviewing official shall mail, by registered or certified mail, or shall deliver, a notice to the person alleged to be liable under section 802 of this title. Such notice shall specify the allegations of liability against such person and shall state the right of such person to request a hearing with respect to such allegations.

"(2) If, within 30 days after receiving a notice under paragraph (1) of this subsection, the person receiving such notice requests a hearing with respect to the allegations contained in such notice—

"(A) the reviewing official shall refer such allegations to a hearing examiner for the commencement of such hearing; and

"(B) the hearing examiner shall commence such hearing by mailing by registered or certified mail, or by delivery, of a notice which complies with paragraphs (2)(A) and (3)(B)(i) of subsection (f) to such person.

"(e) Any hearing commenced under paragraph (2) of subsection (d) shall be conducted by the hearing examiner on the record in order to determine—

"(1) the liability of a person under section 802 of this title; and

"(2) if a person is determined to be liable under such section, the amount of any penalty and assessment to be imposed on such person.

Any such determination shall be based on the preponderance of the evidence.

"(f)(1) Each hearing under subsection (e) of this section shall be conducted—

"(A) in the case of an authority to which the provisions of subchapter II of chapter 5 of this title apply, in accordance with—

"(i) the provisions of such subchapter to the extent that such provisions are not inconsistent with the provisions of this chapter; and

"(ii) procedures promulgated by the authority head under paragraph (3) of this subsection; or

"(B) in the case of an authority to which the provisions of such subchapter do not apply, in accordance with procedures promulgated by the authority head under paragraphs (2) and (3) of this subsection.

"(2) An authority head of an authority described in subparagraph (B) of paragraph (1) shall by regulation promulgate procedures for the conduct of hearings under this chapter. Such procedures shall include:

"(A) The provision of written notice of the hearing to any person alleged to be liable under section 802 of this title, including written notice of—

"(i) the time, place, and nature of the hearing;

"(ii) the legal authority and jurisdiction under which the hearing is to be held; and

"(iii) the matters of facts and law to be asserted.

"(B) The provision to any person alleged to be liable under section 802 of this title of opportunities for the submission of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the hearing, and the public interest permit.

"(C) Procedures to ensure that the hearing examiner shall not, except to the extent required for the disposition of ex parte matters as authorized by law—

"(i) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to the hearing to participate; or

"(ii) be responsible to or subject to the supervision or direction of the investigating official or the reviewing official.

"(D) Procedures to ensure that the investigating official and the reviewing official do not participate or advise in the decision required under subsection (g) of this section or the review of the decision by the authority head under subsection (h) of this section, except as provided in subsection (i) of this section.

"(E) The provision to any person alleged to be liable under section 802 of this title of opportunities to present such person's case through oral or documentary evidence, to submit rebuttal

evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

"(F) Procedures to permit any person alleged to be liable under section 802 of this title to be accompanied, represented, and advised by counsel or such other qualified representative as the authority head may specify in such regulations.

"(G) Procedures to ensure that the hearing is conducted in an impartial manner, including procedures to—

"(i) permit the hearing examiner to at any time disqualify himself; and

"(ii) permit the filing, in good faith, of a timely and sufficient affidavit alleging personal bias or another reason for disqualification of a hearing examiner or a reviewing official.

"(3)(A) Each authority head shall promulgate by regulation procedures described in subparagraph (B) of this paragraph for the conduct of hearings under this chapter. Such procedures shall be in addition to the procedures described in paragraph (1) or paragraph (2) of this subsection, as the case may be.

"(B) The procedures referred to in subparagraph (A) of this paragraph are:

"(i) Procedures for the inclusion, in any written notice of a hearing under this section to any person alleged to be liable under section 802 of this title, of a description of the procedures for the conduct of the hearing.

"(ii) Procedures to permit discovery by any person alleged to be liable under section 802 of this title only to the extent that the hearing examiner determines that such discovery is necessary for the expeditious, fair, and reasonable consideration of the issues. Procedures promulgated under this clause shall prohibit the discovery of the notice required under subsection (a)(2) of this section. Procedures promulgated under this clause shall provide that requests for discovery under this clause shall not be denied unreasonably.

"(4) Each hearing under subsection (e) of this section shall be held—

"(A) in the judicial district of the United States in which the person alleged to be liable under section 802 of this title resides or transacts business;

"(B) in the judicial district of the United States in which the claim or statement upon which the allegation of liability under such section was made, presented, or submitted; or

"(C) in such other place as may be agreed upon by such person and the hearing examiner who will conduct such hearing.

"(g) The hearing examiner shall issue a written decision, including findings and determinations, after the conclusion of the hearing. Such decision shall include the findings of fact and conclusions of law which the hearing examiner relied upon in determining whether a person is liable under this chapter. The hearing examiner shall promptly send to each party to the hearing a copy of such decision and a statement describing the right of any person determined to be liable under section 802 of this title to appeal the decision of

the hearing examiner to the authority head under paragraph (2) of subsection (h).

"(h)(1) Except as provided in paragraph (2) of this subsection and section 805 of this title, the decision, including the findings and determinations, of the hearing examiner issued under subsection (g) of this section are final.

"(2)(A) Within 30 days after the hearing examiner issues a decision under subsection (g) of this section, any person determined in such decision to be liable under section 802 of this title may appeal such decision to the authority head.

"(B) Any authority head reviewing under this section the decision, findings, and determinations of a hearing examiner shall not consider any objection that was not raised inthe hearing conducted pursuant to subsection (e) of this section unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection. If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the hearing examiner for consideration of such additional evidence.

"(C) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty and assessment determined by the hearing examiner pursuant to this section. The authority head shall promptly send to each party to the appeal a copy of the decision of the authority head and a statement describing the right of any person determined to be liable under section 802 of this title to judicial review under section 805 of this title.

"(i) The reviewing official has the exclusive authority to compromise or settle any allegations of liability under section 802 of this title against a person without the consent of the hearing examiner at any time after the date on which the reviewing official is permitted to refer allegations of liability to a hearing examiner under subsection (b) of this section and prior to the date on which the hearing examiner issues a decision under subsection (g) of this section. Any such compromise or settlement shall be in writing.

"§ 804. Subpoena authority

"(a)(1) For the purposes of an investigation under section 803(a)(1) of this title, an investigating official is authorized—

"(A) to administer oaths or affirmations; or

"(B) to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and data not otherwise reasonably available to the authority.

"(2) In conducting an investigation under section 803(a)(1) of this title, the Inspector General of an authority may require by subpoena the attendance and testimony of witnesses if—

"(A) such Inspector General transmits a written notice to the Attorney General specifying that—

"(i) such attendance and testimony are necessary to the conduct of such investigation; and

"(ii) such Inspector General will require by subpoena such attendance and testimony; and

"(B) within 45 days after the Attorney General receives the notice required by subparagraph (A) of this paragraph, the Attorney General or an Assistant Attorney General designated by the Attorney General does not transmit to such investigating official a written statement disapproving such subpoena.

"(3)(A) An Inspector General of an authority may not delegate the authority of such Inspector General under paragraph (2) of this subsection to require by subpoena the attendance and testimony of witnesses to any officer or employee of the authority.

"(B) For purposes of this paragraph and paragraph (2), the term 'Inspector General' means an Inspector General of an authority in which an Office of Inspector General is established by the Inspector General Act of 1978 or by any other Federal law.

"(4) Each subpoena issued under paragraph (2) of this subsection shall—

"(A) prescribe a date, time, and place at which oral testimony shall be commenced;

"(B) describe the procedures under which, in accordance with this section, such testimony will be taken; and

"(C) identify the investigating official who shall conduct the investigation.

"(5)(A) Any investigating official before whom oral testimony is to be taken shall put the person giving such testimony under oath or affirmation and shall personally, or by any individual acting under the direction and in the presence of such investigating official, record and transcribe the testimony of such person.

"(B) Any investigating official before whom oral testimony under this section is to be taken shall exclude from the place where the testimony is to be taken all persons except the person giving the testimony, the attorney for the person giving the testimony, the attorney for the investigating official, any person who may be agreed upon by the investigating official and the person giving the testimony, and any stenographer taking such testimony.

"(C) The oral testimony of any person taken pursuant to a subpoena issued under paragraph (2) of this subsection shall be taken in the judicial district of the United States in which such person resides or transacts business, or in such other place as may be agreed upon by such person and the investigating official before whom the oral testimony of such person is to be taken.

"(D) Any person compelled to appear under a subpoena issued under paragraph (2) of this subsection may be accompanied, represented, and advised by an attorney. The attorney may advise such person, in confidence, either upon the request of such person or upon the initiative of the attorney, with respect to any question asked of such person.

"(E)(i) After the testimony of any person is fully transcribed, the investigating official shall afford the person (who may be accompanied by an attorney) a reasonable opportunity to examine the transcript of such testimony. The transcript shall be read to or by such person, unless such examination and reading are waived by such person. Any changes in form or substance which such person desires to make shall be entered and identified upon the transcript by the investigating official with a statement of the reasons given by such person for making such changes. The transcript shall then be signed

by such person, unless such person in writing waives the signing, is ill, cannot be found, or refuses to sign.

"(ii) If the transcript is not signed by the person within 30 days after the date upon which the person is first afforded a reasonable opportunity to examine the transcript, the invesitgating official shall sign the transcript and state on the record the fact of the waiver, illness, absence of such person, or the refusal to sign, together with any reasons given for the failure to sign.

"(F) The invesitgating official shall certify on the transcript that the person giving testimony was duly sworn by the invesitgating official and that the transcript is a true record of the testimony given by such person.

"(G) The invesitgating official shall furnish a copy of the transcript (upon payment of reasonable charges for the transcript) to the person giving testimony.

"(H) Any person appearing for the taking of oral testimony pursuant ot a subpoena issued under paragraph (2) of this subsection shall be entitled to the same fees and mileage which are paid to witnesses in the district courts of the United States.

"(b) For the purposes of conducting a hearing under section 803(e) of this title, a hearing examiner is authorized—

"(1) to administer oaths or affirmations; and

"(2) to require by subpoena the attendance and testimony of witnesses and the production of all information, documents, reports, answers, records, account, papers, and other data and documentary evidence which the hearing examiner considers relevant and material to the hearing.

"(c) In the case of contumacy or refusal to obey a subpoena issued pursuant to subsection (a) or (b) of this section, an invesitgating official or a hearing examiner, as the case may be, may request the Attorney General to invoke the aid of any district court of the United States in the district in which such investigation or hearing is being conducted, or where the person receiving the subpoena resides or conducts business. The district courts of the United States shall have jurisdiction to issue an appropriate order for the enforcement of any such subpoena. Any failure to obey such order of the court is punishable by such court as contempt.

"§ 805. Judicial review

"(a)(1) A determination by a reviewing official under section 803 of this title shall be final and shall not be subject to judicial review.

"(2) Unless a petition is filed under this section, a determination under section 803 of this title that a person is liable under section 802 of this title shall be final and shall not be subject to judicial review.

"(b)(1)(A) Any person for whom a determination of liability under section 802 of this title has been made pursuant to section 803 of this title may obtain review of such determination in—

"(i) the United States Court of Appeals for the circuit in which such person resides or transacts business;

"(ii) the United States Court of Appeals for the circuit in which the claim or statement upon which the determination of liability is based was made, presented, or submitted; or

"(iii) the United States Court of Appeals for the District of Columbia Circuit.

"(B) Such review may be obtained by filing in any such court a written petition that such determination be modified or set aside. Such petition shall be filed—

"(i) only after such person has exhausted all administrative remedies under this chapter; and

"(ii) within 60 days after the date on which the authority head sends such person a copy of the decision of such authority head under section 803(h)(2) of this title.

"(2) The clerk of the court shall transmit a copy of a petition filed under paragraph (1) of this subsection to the authority head and to the Attorney General. Upon receipt of the copy of such petition, the authority head shall transmit to the Attorney General the record in the proceeding resulting in the determination of liability under section 802 of this title. Except as otherwise provided in this section, the courts of appeals of the United States shall have jurisdiction to review the decision, findings, and determinations in issue and to affirm, modify, remand for further consideration, or set aside, in whole or in part, the decision, findings, and determinations of the hearing examiner and the authority head, and to enforce such decision, findings, and determinations to the extent that such decision, findings, and determinations are affirmed or modified.

"(c) The findings of the hearing examiner with respect to questions of fact shall be final and conclusive, and shall not be set aside unless the decision of the hearing examiner is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if such findings are not supported by substantial evidence.

"(d) Any court of appeals reviewing under this section the decision, findings, and determinations of a hearing examiner or an authority head shall not consider any objection that was not raised in the hearing conducted pursuant to section 803(e) of this title unless a demonstration is made of extraordinary circumstance causing the failure to raise the objection. If any party demonstrates to the satisfaction of the court that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the court shall remand the matter to the hearing examiner for consideration of such additional evidence.

"(e) Upon a final determination by the court of appeals that a person is liable under section 802 of this title, the court shall enter a final judgment for the appropriate amount in favor of the United States, and such judgment may be recorded and enforced by the Attorney General to the same extent and in the same manner as a judgment entered by any United States district court.

"§806. Collection of civil penalties and assessments

"(a) The Attorney General shall be responsible for judicial enforcement of any civil peanlty or assessment imposed pursuant to the provisions of this chapter.

"(b) Any penalty or assessment imposed in a determination which has become final pursuant to section 803 of this title may be recovered in a civil action brought by the Attorney General. In any such action, no matter that was raised or that could have been raised in

a hearing conducted under section 803(e) of this title or pursuant to judicial review under section 805 of this title may be raised as a defense, and the determination of liability and the determination of amounts of penalties and assessments shall not be subject to review.

"(c) The district courts of the United States and of any territory or possession of the United States shall have jurisdiction of any action commenced by the United States under subsection (b) of this section.

"(d) Any action under subsection (b) of this section may, without regard to venue requirements, be joined and consolidated with or asserted as a counterclaim, cross-claim, or setoff by the United States in any other civil action which includes as parties the United States and the person against whom such action may be brought.

"(e)(1) The United States Claims Court shall have jurisdiction of any action under subsection (b) of this section to recover any penalty and assessment if the cause of action is asserted by the United States as a counterclaim in a matter pending in such court. The United States may join as additional parties in such counterclaim all persons who may be jointly and severally liable with the person against whom such counterclaim is asserted.

"(2) No cross-claims or third-party claims not otherwise within the jurisdiction of the United States Claims Court shall be asserted among additional parties joined under paragraph (1) of this subsection.

"(f) The Attorney General shall have exclusive authority to compromise or settle any penalty and assessment the determination of which is the subject of a pending petition pursuant to section 805 of this title or a pending action to recover such penalty or assessment pursuant to this section.

"(g) Any amount of penalty and assessment collected under this chapter shall be deposited as miscellaneous receipts in the Treasury of the United States.

"§ 807. Right to setoff.

"(a)(1) The amount of any penalty or assessment which has become final under section 803 of this title, or for which a judgment has been entered under section 805(e) or 806 of this title, or any amount agreed upon in a settlement or compomise under section 803(i) or 806(f) of this title, may be deducted from any sum, except for a refund of an overpayment of Federal taxes, then or late owing by the United States to the person liable for such penalty and assessment.

"(2) The authority head shall transmit written notice of each deduction made under this paragraph to the person liable for such penalty and assessment.

"(3) All amounts retained pursuant to this paragraph shall be remitted to the Secretary of the Treasury for deposit in accordance with section 806(g) of this title.

"(3) All amounts retained pursuant to this paragraph shall be remitted to the Secretary of the Treasury for deposit in accordance with section 806(g) of this title.

"(b) An authority head may forward a certified copy of any determination as to liability for any penalty or assessment which has become final under section 803 of this title, a certified copy of any judgment which has been entered under section 805(e) or 806 of this

title, or a certified copy of any settlement or compromise under section 803(i) or 806(f) of this title, to the Secretary of the Treasury for action in accordance with subsection (a) of this section.

"§ 808. Limitations

"(a) A hearing under section 803(d)(2) of this title with respect to a claim or statement shall be commenced within six years after the date on which such claim or statement is made, presented, or submitted.

"(b) A civil action to recover a penalty and assesssment under section 806 of this title shall be commenced within three years after the date on which the determination of liability for such penalty and assessment becomes final.

"(c) If at any time during the course of proceedings brought pursuant to this chapter the authority head receives or discovers any specific information regarding bribery, gratuities, conflict of interest, or other corruption or similar activity in relation to a false claim or statement, the authority head shall immediately report such information to the Attorney General, and in the case of an authority in which an Office of Inspector General is established by the Inspector General Act of 1978 or by any other Federal law, to the Inspector General of that authority.

"§ 809. Regulations

"(a) Within 180 days after the date of enactment of this chapter, each authority head shall promulgate rules and regulations necessary to implement the provisions of this chapter. Such rules and regulations shall insure that investigating officials and reviewing officials are not responsible for conducting the hearing required in section 803(e) of this title, making the determinations required by subsections (e) and (g) of section 803 of this title, or making the collections under section 806 of this title.

"(b) The Attorney General may enter into a memorandum of understanding with the head of any authority to provide expeditious procedures for approving or disapproving the referral of allegations under section 803(b) of this title and for referral of matters for action under sections 805 and 806 of this title. Such memorandum of understanding may provide advanced authorization to refer allegations under section 803(b) of this title with respect to any particular type or class of alleged false claims or statements if not otherwise barred by section 808 of this title.

"§ 810. Reports

"Not later than October 31 of each year, each authority head shall prepare and transmit to the appropriate committees and subcommittees of the Congress an annual report summarizing actions taken under this chapter during the most recent twelve-month period ending the previous September 30. Such report shall include—

"(1) a summary of matters referred by the investigating official of the authority to the reviewing official of the authority under section 803(a)(1) of this title during such period;

"(2) a summary of matters transmitted to the Attorney General under section 803(b)(1) of this title during such period;

"(3) a summary of all hearings conducted by hearing examiners under section 803(e) of this title, and the results of such hearings, during such period; and

"(4) a summary of the actions taken during such period to collect any civil penalty or assessment imposed under this chapter.".

XIV. MINORITY VIEWS OF MR. COCHRAN

While I share many of the concerns and objectives endorsed by the proponents of S. 1134, The Program Fraud Civil Remedies Act of 1985, I oppose the bill as reported by this Committee.

Although an administrative process may present a cost-efficient alternative for pursuing small dollar fraud cases, any legislation passed by the Senate must protect fully the rights of individuals charged with misconduct. Adequate protections guaranteed by our Constitution are lacking in at least four areas.

First, I believe that liability under S. 1134 should be imposed only in instances where a person has knowledge of the falsity of a claim or statement. S. 1134, however, expands the traditional concept of constructive knowledge and defines it using a negligence standard. Negligence is measured by what a reasonable and prudent person should have done or known and is a test of due care applied after the fact.

The negligence standard in this bill imposes a duty to inquire which is unrelated to knowledge of any fact or circumstance which would put a person on notice that an inquiry should be made. The pertinent determination to be made is what a person knew or didn't know at a particular time under the existing circumstances.

Indeed, the broader negligence standard could result in the imposition of penalties on persons who make honest mistakes or who rely in good faith on others who have more experience, a specific job responsibility, or what is believed to be superior knowledge of facts or circumstances.

I am concerned that we are ignoring fundamental principles of fairness and due process if we permit the imposition of substantial monetary penalties for fraud absent a requirement that some knowledge be proven or at least that a reckless disregard for the truth, or gross negligence, be established to clearly define the kind of behavior that we are seeking to punish.

Second, S. 1134 is modeled after the civil False Claims Act, but significant differences exist between the two. Even though the circuits are split as to whether specific intent to defraud must be proven to impose liability under the False Claims Act, the consensus of opinion is that, at the very least, some presence of knowledge must be proven. The standard utilized in S. 1134 goes beyond and broadens the scope of the False Claims Act.

Furthermore, S. 1134 assesses penalties for false claims up to $10,000 for each false claim plus double the amount falsely claimed, while the False Claims Act merely authorizes a $2,000 penalty and double the amount of damages sustained by the government. S. 1134 also covers false statements which result in no monetary damage to the government while the False Claims Act does not. I am aware that amendments to the False Claims Act have been proposed that could make it consistent with the provisions of S. 1134. However, these two bills are not moving through the Senate together, and there is no guarantee that current discrepancies will be eliminated.

Third, another aspect of S. 1134 which concerns me is the apparent lack of independent prosecutorial review. Although the Attorney General is given veto authority over an investigating official's testimonial subpoena request and a reviewing official's referral of the case for a hearing, the Attorney General is not required to approve or disapprove the request. Simple inaction for 45 days in the case of a subpoena request and 90 days in the case of a hearing referral, will automatically constitute approval by the Attorney General. To provide more than just the illusion of a review, the Attorney General should be required to communicate his approval to the agency.

Finally, I am concerned that the limitations on discovery in the administrative forum do not permit a respondent to discover the evidence necessary for a full defense. Although an administrative procedure by its very nature is streamlined, S. 1134 extends broad power to the government to investigate and develop its case prior to the hearing by allowing, for example, the use of testimonial subpoenas. This authority needs to be balanced by providing a broadened discovery right for the respondent, such as a limited intra-agency interlocutory appeal of a hearing examiner's denial of a discovery request.

I caution my colleagues in the Senate to give careful consideration to the provisions of this legislation. In our desire to provide an alternative recovery procedure for the government, we must be careful to ensure that only true instances of fraudulent conduct are punished, and that important principles of fairness and due process are honored.

THAD COCHRAN.

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